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No. 07-

IN THE

Supreme Court of the United States

T-MOBILE USA, INC., OMNIPOINT COMMUNICATIONS, INC. D/B/A T-MOBILE, AND TMO CA/NV, LLC,
Petitioners,

v.

JENNIFER L. LASTER, ANDREW THOMPSON, ELIZABETH VOORHIES, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED AND ON BEHALF OF THE GENERAL PUBLIC,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, under the Federal Arbitration Act, a federal court may refuse to enforce the terms of an agreement to arbitrate based upon a state-law policy that individual arbitration is unconscionable in cases involving small claims by a consumer.

LIST OF PARTIES AND AFFILIATES

In addition to the parties listed in the caption, the following also were involved in the proceedings below: Verizon Communications, Inc., Cellco Partnership d/b/a Verizon Wireless, Verizon Wireless (VAW) LLC, Airtouch Cellular, Cingular Wireless LLC, Go Wireless, and New Cingular Wireless PCS d/b/a Cingular Wireless.

Pursuant to Rule 29.6 of the Rules of this Court, petitioner T-Mobile USA, Inc. is a wholly-owned subsidiary of T-Mobile Global Holding GmbH, which is a wholly owned subsidiary of T-Mobile International AG, which, in turn, is a wholly owned subsidiary of Deutsche Telekom AG. Deutsche Telekom AG is a publicly traded company, of which approximately 14.83% and 16.87% is owned by the Federal Republic of Germany and the Kreditanstalt für Wiederaufbau (a bank controlled by the Government of the Federal Republic of Germany), respectively. No other publicly-held company owns 10% or more of T-Mobile USA, Inc.

Petitioner Omnipoint Communications, Inc. is a wholly-owned subsidiary of T-Mobile USA, Inc.

Petitioner TMO CA/NV, LLC, is a wholly-owned subsidiary of TMO CA/NV Holdings LLC. TMO CA/NV Holdings LLC is a wholly-owned subsidiary of Omnipoint Communications, Inc., which, as noted, is a wholly-owned subsidiary of T-Mobile USA, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners T-Mobile USA, Inc., OmniPoint Communications, Inc. d/b/a T-Mobile, and TMO CA/NV, LLC (collectively, "T-Mobile") respectfully request that this Court grant the petition for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Ninth Circuit is unreported and is reproduced in the Appendix to this Petition ("Pet. App.") at 1a to 3a. The decision of the District Court denying T-Mobile's motion to compel arbitration is published at 407 F. Supp. 2d 1181 (S.D. Cal. 2005), and is reproduced at Pet. App. 4a-33a.

JURISDICTION

This lawsuit originally was filed in California Superior Court and was removed to federal court in May 2005. Plaintiff Jennifer Laster thereafter filed an amended complaint invoking federal jurisdiction based upon diversity of citizenship under the Class Action Fairness Act of 2005. The district court had jurisdiction under 28 U.S.C. §§ 1332(d) and 1453(b). The Ninth Circuit had appellate jurisdiction over the district court's denial of T-Mobile's motion to compel arbitration under 9 U.S.C. § 16(a)(1). This Court has jurisdiction over this petition for review of the Ninth Circuit's October 25, 2007 decision under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Sections 2 and 4 of the Federal Arbitration Act ("FAA") are reproduced in the Appendix at Pet. App. 34a-35a.

STATEMENT OF THE CASE

This case presents the recurring question whether Section 2 of the FAA permits federal courts to refuse to enforce agreements to arbitrate claims individually based on a state-law policy that individual arbitration of consumer claims is substantively unconscionable. Respondent Jennifer Laster purchased a T-Mobile phone and entered into a written agreement to resolve disputes with T-Mobile through individual arbitration. Notwithstanding that agreement, Laster filed a class action on behalf of herself and all similarly situated California consumers claiming that T-Mobile violated California law by charging California sales tax on the full retail value of discounted wireless telephones. The court below, applying prior Ninth Circuit and California Supreme Court precedent in *Shroyer* v. *New Cingular Wireless Services, Inc.*, 498 F.3d 976 (9th Cir. 2007), and *Discover Bank* v. *Superior Court*, 113 P.3d 1100 (Cal. 2005), held that Laster's arbitration agreement with T-Mobile was unenforceable because it provided for individual and not class-wide arbitration.

The Ninth Circuit's decision is in direct conflict with the Third Circuit's ruling in *Gay* v. *CreditInform*, ___ F.3d ___, 2007 WL 4410362 (3d Cir. Dec. 19, 2007). Indeed, the Ninth Circuit has expressly declined "to follow the Third Circuit's holding in *Gay*." *Lowden* v. *T-Mobile USA, Inc.*, ___ F.3d ___, 2008 WL 170279, at *8 n.3 (9th Cir. Jan. 22, 2008). In *Gay*, the Third Circuit, relying on this Court's decision in *Perry* v. *Thomas*, 482 U.S. 483 (1987), has ruled that the FAA precludes a court from refusing to enforce an agreement to arbitrate individually based upon a state-law determination that individual arbitration of small consumer claims is unconscionable. 2007 WL 4410362, at *20. The

Gay Court concluded that state unconscionability standards are preempted to the extent that they would render individual arbitration unenforceable. Denying enforcement on those grounds, the *Gay* Court explained, would be tantamount to "'rely[ing] on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable.'" *Id.* (quoting *Perry*, 482 U.S. at 492 n.9).

The *Gay* decision, in turn, builds on decisions by other federal circuits holding that individual arbitration is enforceable under the FAA as an entirely appropriate mechanism for resolving federal and state claims by consumers in cases involving relatively small individual amounts. See *Johnson* v. *West Suburban Bank*, 225 F.3d 366, 373 (3d Cir. 2000); *accord Jenkins* v. *First Am. Cash Advance of Ga., LLC*, 400 F.3d 868 (11th Cir. 2005), *cert. denied*, 546 U.S. 1214 (2006); *Livingston* v. *Associates Fin., Inc.*, 339 F.3d 553 (7th Cir. 2003); *Snowden v. CheckPoint Check Cashing*, 290 F.3d 631 (4th Cir. 2002); *Randolph* v. *Green Tree Fin. Corp.*, 244 F.3d 814 (11th Cir. 2001). These courts hold that the FAA mandates enforcement of individual arbitration of claims by consumers notwithstanding the absence of class-wide procedures.

The instant case squarely implicates this conflict over the enforceability of agreements to arbitrate consumer claims individually. In the ruling below, the Ninth Circuit applied *Shroyer* to hold that the FAA does not mandate enforcement of these agreements. Pet. App. 2a-3a. In contrast, the Third Circuit in *Gay* ruled that the FAA does mandate enforcement of agreements requiring individual arbitration of consumer claims, and thus preempts state law to the contrary. Moreover, the Third,

Fourth, Seventh, and Eleventh Circuits all have held – unlike the decision below – that individual arbitration allows for the effective resolution of claims in cases involving consumers.

Resolution of this conflict is necessary because the proper application of the FAA to consumer arbitration agreements presents a recurring issue of fundamental and national importance. The enforceability of agreements to arbitrate under the FAA is a matter that affects the rights of tens of millions of consumers and businesses. Indeed, a state-law rule that arbitration must provide class-wide procedures directly undercuts the benefit of arbitration as a streamlined, low-cost *alternative* to litigation. Decisions by courts that invalidate the terms of these arbitration agreements directly undermine the "primary purpose" of the FAA: to counteract judicial hostility to arbitration and to ensure that arbitration remains a viable alternative to litigation through enforcement of agreements to arbitrate in accordance with their terms. See *Volt Info. Scis., Inc.* v. *Board of Trs.*, 489 U.S. 468, 479 (1989); 9 U.S.C. § 4.

Review is warranted so that the proper application of the FAA and the rights of tens of millions of individuals and businesses are not made to depend upon geography or on the prevailing construction of the FAA within an individual state or federal circuit.

STATUTORY BACKGROUND

In 1925, Congress enacted the FAA in response "to hostility of American courts to the enforcement of arbitration agreements." *Circuit City Stores* v. *Adams*, 532 U.S. 105, 111 (2001). Congress sought to promote arbitration as a meaningful alternative to litigation. "[B]y agreeing to arbitrate, a party 'trades

the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'" *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991). Indeed, "it is typically a desire to keep the effort and expense required to resolve a dispute within manageable bounds that prompts [parties] to forgo access to judicial remedies." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985). For that reason, "Congress, when enacting [the FAA], had the needs of consumers, as well as others, in mind." *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 280 (1995).

The "primary purpose" of the FAA is to "ensur[e] that private agreements to arbitrate are enforced according to their terms." *Volt Info. Scis., Inc.* v. *Board of Trs.*, 489 U.S. 468, 479 (1989). Arbitration agreements must be "rigorously enforce[d]" even if "the result is 'piecemeal' litigation." *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U.S. 213, 221 (1985). Indeed, Section 2 of the FAA "compels judicial enforcement of a wide range of written arbitration agreements," *Circuit City*, 532 U.S. at 111, "'notwithstanding any state substantive or procedural policies to the contrary.'" *Perry* v. *Thomas*, 482 U.S. 483, 489 (1987) (quoting *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

Under the FAA, "the underlying issue of arbitrability" is "a question of substantive federal law," *Southland Corp.* v. *Keating*, 465 U.S. 1, 12 (1984), that "must be addressed with a healthy regard for the federal policy favoring arbitration," *Moses H. Cone*, 460 U.S. at 24. In determining whether an agreement to arbitrate is enforceable, "the text of § 2 provides the touchstone for choosing between state-law principles and the principles of

federal common law." *Perry*, 482 U.S. at 492 n.9. As explained in *Perry*, "[a]n agreement to arbitrate is valid, irrevocable, and enforceable, *as a matter of federal law* 'save upon such grounds as exist at law or in equity for the revocation of *any* contract.'" *Id.* (quoting 9 U.S.C. § 2) (internal citation omitted; emphasis added by Court). "[S]tate law . . . is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." *Id.* at 493 n.9.

"Courts may not . . . invalidate arbitration agreements under state laws applicable *only* to arbitration provisions." *Doctor's Assocs. Inc.* v. *Casarotto*, 517 U.S. 681, 687 (1996); see *Perry*, 482 U.S. at 493 n.9. Likewise, courts may not (i) refuse enforcement based on state laws applicable only to certain types or categories of contracts, *Southland*, 465 U.S. at 16 n.11, or (ii) rely upon a fundamental aspect of arbitration as a basis for a ruling that arbitration is unconscionable, *Perry*, 482 U.S. at 493 n.9.

FACTUAL BACKGROUND

Petitioner T-Mobile markets and sells wireless telecommunications services, phones, and accessories throughout the United States. T-Mobile, which currently has more than 28 million customers, uses standardized contracts because it cannot realistically negotiate separate terms and conditions with each of these customers. Of course, no consumer is compelled to buy T-Mobile's service or accept its terms and conditions given the highly competitive market for wireless service.

a. Wireless service and phones often are sold together in "bundled" transactions, in which consumers receive a free or significantly discounted

phone in exchange for agreeing to wireless service contracts for a term of one or two years. When T-Mobile offers a free or discounted phone as part of a bundled transaction, some states (such as California) require that T-Mobile charge sales tax based on the full retail value of the phone.

On February 23, 2005, Plaintiff Laster purchased a wireless phone and wireless service at a T-Mobile store in San Diego, California. Pet. App. 8a-9a. As part of that transaction, Laster received the phone at no cost. California law requires that sales tax be paid on the full retail value of the phone when the sale is part of a bundled transaction. See Cal. Code Regs. tit. 18, § 1585(a)(4), (b)(3). These taxes were reflected on Laster's receipt, which showed that she was charged $28.22 in sales tax (based upon the $364.13 retail value of the phone). She paid the sales tax. Pet. App. 9a. Indeed, Laster admitted in her Complaint that when she made her purchase, her receipt disclosed the amount of tax and that "'[b]y law, some states impose a tax based on the retail price or cost of our product instead of the discounted price.'" First Am. Compl. ¶ 23 (9th Cir. Excerpts of Record ("ER") at 44).

At the time of her purchase, Laster also signed a Service Agreement and agreed to terms and conditions including "MANDATORY ARBITRATION." Pet. App. 9a; ER 123. Accompanying Laster's new phone was the T-Mobile Welcome Guide, which set forth in full the terms and conditions of service. The first paragraph advised, "IF YOU DON'T AGREE WITH THESE [TERMS AND CONDITIONS], DO NOT USE THE SERVICE OR YOUR UNIT." ER 109. The Agreement provided her with 30 days to cancel her service with no further obligation and return her phone for a full refund. ER

109. The trial period also was disclosed on Laster's sales receipt. ER 81. Laster chose to keep her phone, to continue her T-Mobile service, and to accept the corresponding terms and conditions. See ER 77.

Section 3 of the Terms and Conditions sets forth an arbitration agreement, which provides that it is governed by "the Federal Arbitration Act and federal arbitration law":

> Mandatory Arbitration: Dispute Resolution. YOU WILL FIRST NEGOTIATE WITH US IN GOOD FAITH TO SETTLE ANY CLAIM OR DISPUTE BETWEEN YOU AND US IN ANY WAY RELATED TO OR CONCERNING THE AGREEMENT, OR OUR PROVISION TO YOU OF GOODS, SERVICES, OR UNITS ("CLAIM"). . . . IF YOU DO NOT REACH AGREEMENT WITH US WITHIN 30 DAYS, INSTEAD OF SUING IN COURT, YOU AGREE THAT ANY CLAIM MUST BE SUBMITTED TO FINAL, BINDING ARBITRATION . . . .
>
> Neither you nor we may be a representative of other potential claimants or a class of potential claimants in any dispute, nor may two or more individuals' disputes be consolidated in one proceeding. . . . YOU AND WE ACKNOWLEDGE AND AGREE THAT THIS SEC. 3 WAIVES ANY RIGHT TO A JURY TRIAL OR PARTICIPATION AS A PLAINTIFF OR AS A CLASS MEMBER IN A CLASS ACTION.

Pet. App. 36a-37a (capitalization in original). The arbitration agreement further provides that the arbitrator can award Laster the same relief and remedies as a court, and that T-Mobile would pay all of the arbitrator fees for claims under $25, and all arbitrator fees, except $25, for claims valued between

$25 to $1000. *Id.* Finally, the arbitration agreement provided that Laster could seek relief in small claims court. *Id.* The arbitration agreement is reproduced at Pet. App. 36a-38a.

b. Notwithstanding this agreement, in May 2005, Laster filed a class action in California state court. Her lawsuit advanced three causes of action arising from her purchase of a wireless phone and service.

First, she claimed that T-Mobile was liable under California's False Advertising Law, Cal. Bus. & Prof. Code § 17500. According to the First Amended Complaint, T-Mobile and other defendants "failed to adequately disclose the fact that sales tax would be charged on the full value of the phone," and where disclosure was made, as it was in Laster's case, "the type-size, font, and location of the disclosure" were inadequate. First Am. Compl. ¶ 36 (ER 48). Second, Laster claimed that T-Mobile violated California's Consumer Legal Remedies Act, Cal. Civ. Code § 1780, because its advertising with respect to her phone was an unfair method of competition and an unfair or deceptive act or practice. First Am. Compl. ¶ 42 (ER 49). Finally, Laster sought recovery under California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200. First Am. Compl. ¶ 48 (ER 50). In connection with these claims, Laster sought injunctive relief, restitution, compensatory damages, "punitive damages," and "all attorneys' fees and litigation expenses." *Id.* ¶¶ 44-46, 53 (ER 50, 53).

c. After removal to federal court, T-Mobile moved to compel arbitration under the FAA. Pet. App. 5a. The district court denied that motion, ruling first that the arbitration agreement was contained in a form contract, and was therefore, *per se*, procedurally unconscionable. *Id.* at 15a-16a.

Relying on the California Supreme Court's decision in *Discover Bank* v. *Superior Court*, 113 P.3d 1100 (Cal. 2005), the district court also ruled that the agreement was substantively unconscionable because it required individual arbitration – *i.e.*, it did not allow class-wide arbitration. The district court explained that under *Discover Bank*, "a classwide arbitration bar is unconscionable" if: "(1) the class action waiver is contained in a consumer contract of adhesion, in which small amounts of damages are at issue; and (2) it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money." Pet. App. 20a.

Because plaintiff Laster alleged claims that involved individually "small amounts of money," and because she alleged (despite disclosures, including on her sales receipt, that she knew she was paying the tax) that charging consumers sales tax on the full retail value of the phone was a "scheme to mislead consumers," the district court concluded that Laster had satisfied the *Discover Bank* test. Pet. App. 20-21a. The district court dismissed as irrelevant evidence that plaintiffs had significant incentives to arbitrate their individual claims because, if successful, they would be entitled to attorneys' fees and costs. *Id.* at 21a-22a.

Finally, the district court adopted the conclusion from *Discover Bank* that the FAA did not preempt California law refusing to enforce individual arbitration because that court had invoked state unconscionability law. Pet. App. 24a. The court ruled that "unconscionability . . . may be employed as a principle of general applicability to invalidate an arbitration agreement without contravening § 2 of the FAA." *Id.*

d. The Ninth Circuit affirmed. It concluded, in an unpublished per curiam decision, that T-Mobile's arbitration agreement was "not substantively distinguishable" from an agreement that the Ninth Circuit had previously refused to enforce in *Shroyer* v. *New Cingular Wireless Services, Inc.*, 498 F.3d 976 (9th Cir. 2007). Pet. App. 2a. The panel below explained that *Shroyer* "rejected the argument that California law is preempted by the Federal Arbitration Act" and that it lacked "the authority to revisit the decision of a prior three-judge panel." *Id.* at 3a.

Specifically, in *Shroyer*, Judge Reinhardt, joined by Judges Nelson and Rymer, adopted the California Supreme Court's state-law unconscionability analysis in *Discover Bank*. *Shroyer* further held that the ability of a party to recover attorneys' fees and arbitration costs in individual arbitration did not alter the conclusion that individual arbitration was unconscionable under California law. 498 F.3d at 986. Finally, as to preemption under the FAA, the *Shroyer* Court adopted *Discover Bank*'s analysis and held that the FAA "does not bar federal or state courts from applying generally applicable state contract law principles and refusing to enforce an unconscionable class action waiver in an arbitration clause." *Id.* at 987.

REASONS FOR GRANTING THE PETITION

Review is warranted because this case squarely implicates a conflict on an important and recurring issue of federal law: Whether the FAA requires enforcement of agreements to arbitrate consumer disputes on an individual basis, or whether such agreements can be invalidated based on state-law policy in favor of class actions.

The California Supreme Court in *Discover Bank*, followed by the Ninth Circuit in *Shroyer* and other state supreme courts, have held that the FAA permits them to refuse to enforce the terms of agreements to arbitrate based on a state-law determination that the absence of class-action procedures available in litigation is "unconscionable." In stark contrast, the Third Circuit in *Gay* has ruled that to the extent state law holds that arbitration agreements are unconscionable because they lack class-wide procedures, then state law must give way to the requirements of the FAA. Since then, the Ninth Circuit has considered, but "declined to follow the holding in *Gay*." *Lowden* v. *T-Mobile USA, Inc.*, ___ F.3d ___, 2008 WL 170279, at *8 n.3 (9th Cir. Jan. 22, 2008). In contrast, other circuits have held that individual arbitration agreements involving claims by consumers must be enforced under the FAA. See *supra* at 3.

Further, the ruling below conflicts with this Court's decisions such as *Perry* v. *Thomas*, which ruled that a court may not rely upon the "uniqueness" of arbitration to hold that an arbitration agreement is "unconscionable." 482 U.S. 483, 493 n.9 (1987). This Court has explained that the FAA was enacted to ensure that arbitration remains a meaningful *alternative* to litigation. That is why the FAA requires not simply enforcement of arbitration, but enforcement of arbitration in accordance with the terms agreed to by the parties. See *Volt Info. Scis., Inc.* v. *Board of Trs.*, 489 U.S. 468, 479 (1989); 9 U.S.C. § 4.

The decision below threatens the continued viability of agreements to arbitrate in a broad range of consumer transactions. The benefits of arbitration as an alternative to litigation are lost when state law

requires that the procedures agreed to by parties in their contracts must give way to the more formal, expensive and time-consuming procedures found in courtroom litigation. Under the FAA, a state-law requirement that arbitration must replicate courtroom litigation is preempted.

Here, the arbitration agreement was deemed unenforceable even though (i) T-Mobile agreed to pay virtually all arbitrator costs, (ii) plaintiff could recover attorneys' fees if she prevailed on her claims, and (iii) plaintiff retained the option of filing suit in small claims court. Nevertheless, individual arbitration was ruled unenforceable because the parties agreed to an alternative to the complex, costly and time-consuming class-wide procedures in litigation and declined to subject their agreement to the "greater degree of court involvement" and "external supervision" necessary to implement class arbitration. *Discover Bank* v. *Superior Court*, 113 P.3d 1100, 1106 (Cal. 2005) (internal quotes omitted).

Resolution of this dispute is critical to the proper and uniform application of the FAA to the rights of tens of millions of consumers and businesses throughout the country. Individual dispute resolution lies at the heart of agreements to arbitrate that have been adopted by consumers and businesses across the country, including for banking, credit cards, internet sales, cable television, and wireless and wireline phone services. The decision below, however, threatens to undermine the ability of consumers and businesses to reject the delay and expense of traditional litigation in favor of "the simplicity, informality, and expedition of arbitration." *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991).

If arbitration under the FAA is to remain a meaningful alternative to litigation, state law should not be permitted to bar enforcement of agreements to arbitrate simply because they do not provide for the same procedures associated with litigation. To require that arbitration mirror litigation in this fashion is nothing less than the "judicial hostility" that Congress intended to eliminate through the FAA.

I. THE DECISION BELOW IMPLICATES A CONFLICT AMONG STATE AND FEDERAL COURTS OVER THE ENFORCEABILITY OF INDIVIDUAL ARBITRATION UNDER THE FAA.

This case presents a conflict on the recurring question whether, under the FAA, courts may refuse to enforce private agreements to arbitrate that require individual resolution of claims by consumers. Resolution of this conflict is necessary to ensure that the rights of tens of millions of individuals and businesses are not made to depend on the prevailing interpretation of the FAA in a particular state or federal circuit.

a. The decision below adopts the analysis set forth by the Ninth Circuit in *Shroyer*, 498 F.3d 976, which, in turn, adopts the California Supreme Court's decision in *Discover Bank*, 113 P.3d 1100. Both *Shroyer* and *Discover Bank* hold that the FAA does not mandate enforcement of form agreements with consumers calling for individual arbitration. Pet. App. 2a-3a.

In *Discover Bank*, the California Supreme Court held that "at least in some circumstances, . . . class action waivers in consumer contracts of adhesion are unenforceable, whether the consumer is being asked

to waive the right to class action litigation or the right to classwide arbitration." 113 P.3d at 1103. That court further held that the FAA does not "preempt[] California law in this respect." *Id.*

In reaching that conclusion, the *Discover Bank* Court acknowledged that class-wide arbitration necessarily requires a "greater degree of court involvement" than traditional arbitration, and, in fact, was better characterized as a "*hybrid procedure* of classwide arbitration." *Id.* at 1106 (emphasis added). Under that "hybrid procedure," a "court would have to make initial determinations regarding certification and notice to the class, and if classwide arbitration proceeds it may be called upon to exercise a measure of external supervision in order to safeguard the rights of absent class members to adequate representation and in the event of dismissal or settlement." *Id.* (quoting *Keating* v. *Superior Court*, 645 P.2d 1192, 1209 (Cal. 1982)). Nevertheless, the "judicial intrusion" into private arbitration was appropriate, the court concluded, given the "important role of class action remedies in California law." *Id.*

Discover Bank disagreed with the rulings by other courts that the "potential availability of attorney fees to the prevailing party in arbitration or litigation ameliorates the problem posed by such class action waivers." *Id.* at 1109-10. In particular, the court rejected the Fourth Circuit's conclusion that the availability of attorneys' fees or other forms of redress, including "informal resolution," were "adequate substitute[s]" for the "class action or arbitration mechanism." *Id.* at 1110 (disagreeing with *Snowden* v. *Checkpoint Check Cashing*, 290 F.3d 631, 638 (4th Cir. 2002)).

Finally, the court rejected the argument that the FAA mandated enforcement notwithstanding contrary state policies in favor of class actions because "the FAA does not federalize the law of unconscionability or related contract defenses except to the extent that it forbids the use of such defenses to discriminate against arbitration clauses." *Id.* at 1112-13. Because California law favored class-wide litigation of certain consumer claims, the court concluded that imposition of a similar preference in favor of class-wide arbitration reflected no "discrimination" against arbitration. *Id.* at 1113.

The Ninth Circuit embraced *Discover Bank*'s analysis in *Shroyer* v. *New Cingular Wireless Servs., Inc.*, 498 F.3d 976 (9th Cir. 2007). Writing for the panel, Judge Reinhardt applied *Discover Bank*'s test and found that a class waiver in an arbitration agreement was unconscionable under California law to resolve the claims of a plaintiff who sought to represent a class of wireless phone consumers. *Id.* at 984-86. In doing so, the Ninth Circuit rejected Cingular's argument that its agreement to arbitrate "does not deter customers from arbitrating individual small-value claims" or "insulate Cingular from liability" even though Cingular had agreed to pay the full costs of arbitration and permitted recovery of attorneys' fees. *Id.* at 986.

Finally, the *Shroyer* court rejected the argument that the FAA preempted a finding that the agreement to arbitrate was unenforceable because it concluded that, as a blanket matter, "'unconscionability is a generally applicable contract defense [that] may be applied to invalidate an arbitration agreement without contravening § 2 of the FAA.'" *Id.* at 988 (quoting *Ting v. AT&T Corp.*, 319 F.3d 1126, 1150 n.15 (9th Cir. 2003)).

The First Circuit has likewise followed *Discover Bank* in ruling that an agreement to arbitrate individually was unenforceable with respect to federal and state antitrust claims because it denied consumers class-wide procedures. See *Kristian* v. *Comcast Corp.*, 446 F.3d 25, 59 (1st Cir. 2006). In doing so, the First Circuit held that enforceability of agreements to arbitrate is an issue of federal law because "state contract law doctrines, by operation of the FAA, become part of the federal substantive law of arbitrability." *Id.* at 63.

A number of state courts of last resort have followed *Discover Bank*'s and *Shroyer*'s basic approach to the enforcement of arbitration agreements under the FAA. Most recently, in *Scott* v. *Cingular Wireless*, 161 P.3d 1000 (Wash. 2007) (en banc), Washington's Supreme Court held that *all* class waivers in consumer arbitration agreements are unenforceable because "class actions are a critical piece of the enforcement of consumer protection law." *Id.* at 1006. The *Scott* Court also followed *Discover Bank* in holding that state law "striking a class action waiver in an arbitration clause does not violate the FAA." *Id.* at 1008.[1]

Three Justices dissented in *Scott*. They concluded that the majority approach "disfavors arbitration, contradicting the strong legislative public policy favoring arbitration of disputes embodied in the

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[1] Applying *Scott*, the Ninth Circuit has held that "T-Mobile's class action waiver is substantively unconscionable, and unenforceable, under Washington law," *Lowden* v. *T-Mobile USA, Inc.*, ___ F.3d ___, 2008 WL 170279, at *5 (9th Cir. Jan. 22, 2008), and that the FAA "does not preempt Washington's unconscionability law," *id.* at *7. In doing so, the Ninth Circuit was presented with and declined "to follow the Third Circuit's holding in *Gay*." *Id.* at *8.

Federal Arbitration Act." *Id.* at 1009 (Madsen, J., dissenting). The dissenters concluded that the "refusal to enforce this agreement as written is, without any doubt whatsoever, contrary to the federal policy favoring arbitration" and contrary to "the many courts that have rejected arguments that class action waivers are substantively unconscionable." *Id.* at 1014 (citing cases).[2]

b. In direct conflict with these cases, the Third Circuit in *Gay* v. *CreditInform*, ___ F.3d ___, 2007 WL 4410362 (3d Cir. Dec. 19, 2007), has ruled that state unconscionability law is preempted by the FAA to the extent that it would render individual arbitration of consumer claims unenforceable.

In *Gay*, a Pennsylvania consumer who had entered into a contract to purchase "credit repair services" challenged the provision of her agreement that required mandatory arbitration of any dispute "on an individual basis not consolidated with any other claim." *Id.* at *2. In spite of this agreement, Gay filed a class action advancing claims under the federal Credit Repair Organizations Act and the Pennsylvania Credit Services Act. *Id.* at *1. The district court compelled arbitration of Gay's claims.

On appeal, the Third Circuit affirmed. The court of appeals emphasized that "'[f]ederal law determines whether an issue governed by the FAA is referable to arbitration.'" *Id.* at *14 (alteration in original) (quoting *Harris* v. *Green Tree Fin. Corp.*, 183 F.3d

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[2] *See also Muhammad* v. *County Bank*, 912 A.2d 88, 99 (N.J. 2006) (following *Discover Bank* and holding that agreements to arbitrate individually were unconscionable and unenforceable under Section 2 of the FAA), *cert. denied*, 127 S. Ct. 2032 (2007); *accord Coady* v. *Cross Country Bank*, 729 N.W.2d 732 (Wis. Ct. App.), *review denied*, 737 N.W.2d 432 (Wis. 2007).

173, 178 (3d Cir. 1999)). As a "matter of pure federal common law," the court saw "no reason to conclude that the arbitration provision is unconscionable." *Id.* at *17 n.14. The Third Circuit acknowledged, however, that "two Superior court panels recognized that under Pennsylvania law, class actions are . . . of great public importance as the essential vehicle for vindicating consumer rights." *Id.* at *19 (citation and internal quotation marks omitted). The court explained, however, that "those cases are hardly the end point of our unconscionability analysis because we are concerned with the federal law that Congress set forth in the FAA; the federal law is controlling here and Pennsylvania law must conform with it." *Id.*[3]

Indeed, under binding precedent, "[w]hatever the benefits of class actions, the FAA 'requires piecemeal resolution when necessary to give effect to an arbitration agreement.'" *Id.* at *20 (alternation in original, emphasis omitted) (quoting *Moses H. Cone*, 460 U.S. at 20). The Third Circuit explained that although the "Pennsylvania cases are written ostensibly to apply general principles of contract law, they hold that an agreement to arbitrate may be unconscionable simply because it is an agreement to arbitrate." *Id.* Specifically, Pennsylvania unconscionability law was preempted by the FAA because the state decisions improperly "'rely on the unique-

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[3] The court also concluded that, under Virginia law, an agreement to "arbitrate disputes on an individual basis" does not "constitute an unconscionable bargain," *Gay*, 2007 WL 4410362, at *17, because even where plaintiffs "'lack the procedural right to proceed as part of a class, they retain the range of rights' created by the relevant statute . . . 'in individual arbitration proceedings.'" *Id.* (quoting *Johnson*, 225 F.3d at 373).

ness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable.'" *Id.* (quoting *Perry*, 482 U.S. at 492 n.9).

As a result, the Third Circuit ruled that it would not "apply state law" because to do so would "interfere with the appropriate application of the FAA." *Id.* at *21. The *Gay* Court noted that a contrary conclusion could extend "to arbitration provisions in all sorts of contracts between vendors of goods and services on the one hand and consumers on the other hand" and thus "result in a significant narrowing of the application of the FAA." *Id.* The Third Circuit rejected that course because "[i]f the reach of the FAA is to be confined then Congress and not the courts should be the body to do so." *Id.*[4]

Other federal circuits likewise have rejected the conclusion that individual arbitration denies consumers the ability effectively to vindicate their statutory claims even in cases involving relatively small amounts. The analysis by these federal courts conflicts directly with the California Supreme Court's and Ninth Circuit's conclusions that individual

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[4] The Seventh Circuit has voiced similar skepticism about the use of "unconscionability" as a means for avoiding arbitration under the FAA. *See Oblix, Inc.* v. *Winiecki*, 374 F.3d 488, 491-92 (7th Cir. 2004) (rejecting on FAA grounds unconscionability challenge to arbitration agreement under California law because the state "routinely enforces limited warranties and other terms found in form contracts" and "[i]f a state treats arbitration differently, and imposes on form arbitration clauses more or different requirements from those imposed on other clauses, then its approach is preempted by § 2 [of the FAA]").

arbitrations are ineffective in resolving small claims by consumers.[5]

Thus, the Eleventh Circuit has held that a class waiver is not substantively unconscionable in a lawsuit involving claims based on small personal loans under federal law and Georgia RICO law. *Jenkins* v. *First Am. Cash Advance of Ga., LLC*, 400 F.3d 868, 878 (11th Cir. 2005), *cert. denied*, 546 U.S. 1214 (2006); see also *Randolph* v. *Green Tree Fin. Corp.*, 244 F.3d 814, 818 (11th Cir. 2001) (same). The *Jenkins* Court explained that the denial of a class-action mechanism was not unconscionable because the availability of attorney's fees under the arbitration agreement provided plaintiffs with effective access to legal representation, and therefore "arbitration agreements prohibiting class action relief do not necessarily choke off the supply of lawyers willing to pursue claims on behalf of debtors." 400 F.3d at 878 (internal quotation marks omitted).

The Eleventh Circuit's ruling in *Jenkins*, in turn, relied on the Fourth Circuit's decision in *Snowden* v. *Checkpoint Check Cashing*, 290 F.3d 631 (4th Cir. 2002). There, the Fourth Circuit enforced an arbitration agreement and rejected the consumer's claim that the agreement was unconscionable on the alleged ground that "without the class action vehicle,

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[5] The First Circuit has noted the close relationship between these methods of analysis because "the unconscionability analysis always includes an element that is the essence of the vindication of statutory rights analysis." *Kristian*, 446 F.3d at 60 n.22; *see Faber* v. *Menard, Inc.*, 367 F.3d 1048, 1053 (8th Cir. 2004) (applying "vindication of statutory rights" analysis to assess unconscionability argument); *Booker* v. *Robert Half Int'l, Inc.*, 413 F.3d 77, 84 (D.C. Cir. 2005) (applying "vindication of statutory rights" analysis to assess enforceability of arbitration agreement applied to state law claims).

[plaintiff] will be unable to maintain her legal representation given the small amount of her individual damages." *Id.* at 638. The Fourth Circuit explained that plaintiff's fears about the loss of her legal representation were unfounded because "'[a]ttorneys' fees'" were recoverable by a prevailing plaintiff in arbitration. *Id.* at 638-39. The court of appeals further rejected the argument that "forcing consumers . . . to arbitrate consumer protection claims [was] against public policy relating to consumer protection." *Id.* at 639.

The Fourth Circuit's decision in *Snowden* expressly followed the Third Circuit's decision in *Johnson* v. *West Suburban Bank*, 225 F.3d 366 (3d Cir. 2000). In *Johnson*, the court of appeals, through Judge Becker, explained that although individual arbitration of consumer claims under the Truth in Lending Act ("TILA") "that might have been pursued as part of class actions potentially reduces the number of plaintiffs seeking to enforce the TILA against creditors, arbitration does not eliminate plaintiff incentives to assert rights under the Act." *Id.* at 374. Accordingly, the FAA mandated enforcement of individual arbitration. *Id.* at 374-75. *See also Livingston* v. *Associates Fin., Inc.*, 339 F.3d 553, 559 (7th Cir. 2003) (following *Johnson* and *Randolph* and compelling arbitration of agreement that precludes "class action arbitration" of TILA claims).

c. Resolution of this conflict is of critical importance because the enforceability of agreements to arbitrate individually under the FAA is an issue that affects the rights set forth in consumer agreements entered into by individuals and businesses across the country.

As noted, private agreements to arbitrate are protected by federal law because they provide for a

lower-cost, streamlined means of resolving disputes that benefits both individual consumers and businesses. Indeed, "Congress, when enacting [the FAA], had the needs of consumers, as well as others, in mind." *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 280 (1995). Recognizing these benefits, arbitration agreements are contained in countless agreements between individual consumers and the businesses that compete to provide them internet service, cable service, banking and credit card services, computers and software, and wireless and wireline telephone service.

The decision below, however, adopts an interpretation of the FAA that undermines the enforceability of these ubiquitous agreements and threatens the mutual benefits that they provide to consumers and businesses. "Standard-form agreements are a fact of life," *Oblix, Inc.* v. *Winiecki*, 374 F.3d 488, 491 (7th Cir. 2004); they "reduce transaction costs and benefit consumers because, in competition, reductions in the cost of doing business show up as lower prices," *Carbajal* v. *H&R Block Tax Servs., Inc.*, 372 F.3d 903, 906 (7th Cir. 2004) (Easterbrook, J.). As the Seventh Circuit has explained, state law should not be permitted to trump federal law in this area because "[t]he cry of 'unconscionable!' just repackages the tired assertion that arbitration should be disparaged as second-class adjudication." *Id.* Indeed, legal commentators have explained that courts are applying new forms of "unconscionability" doctrine in an effort to strike down or rewrite agreements to arbitrate.[6]

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[6] *See* Michael G. McGuinness & Adam J. Karr, *California's "Unique" Approach to Arbitration: Why This Road Less Traveled Will Make All the Difference on the Issue of Preemption Under the Federal Arbitration Act*, 2005 J. Disp. Resol. 61, 62 (2005)

In this case, the district court and court of appeals applied *Shroyer* and *Discover Bank* to hold that individual arbitration of consumer disputes is "unconscionable" under California law and that the FAA's liberal policy in favor of enforcing arbitration agreements must give way to the requirements of state law. *Shroyer*, 498 F.3d at 988; *Discover Bank*, 113 P.3d at 1106. Likewise, the Washington Supreme Court and First Circuit both have followed *Discover Bank* and refused to enforce agreements to arbitrate that do not provide class procedures in claims involving consumers. See *Kristian*, 446 F.3d at 59-60; *Scott*, 161 P.3d at 1006.

In direct conflict, the Third Circuit in *Gay* has ruled that the enforceability of agreements to arbitrate is an issue of federal law and state unconscionability law cannot be used to avoid individual arbitration of consumer claims. *Gay*, 2007 WL 4410362, at *21. The Ninth Circuit, after expressly considering the Third Circuit's contrary analysis, "declined to follow the Third's Circuit's holding in *Gay*." *Lowden*, 2008 WL 170279, at *8 n.3.

Further, the suggestion that individual arbitration is "unconscionable" likewise cannot be reconciled with other decisions of the Third Circuit, as well as those

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("California has created a new brand of unconscionability. It is far more demanding—and it is unique to arbitration."); Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 Buff. L. Rev. 185, 186 (2004) ("increased receptivity to claims of unconscionability in the context of arbitration agreements suggests judicial hostility to arbitration"); Stephen J. Ware, *Arbitration and Unconscionability After Doctor's Associates, Inc. v. Casarotto*, 31 Wake Forest L. Rev. 1001, 1034 (1996) ("Judicial decisions apply unconscionability, and other common law doctrines, more aggressively to arbitration agreements than to other contracts.").

of the Fourth, Seventh, and Eleventh Circuits. Each of those federal circuits has held that that individual arbitration is enforceable under the FAA in cases involving small claims by consumers notwithstanding the absence of class-wide procedures of the sort required by *Shroyer* and *Discover Bank*. See, *e.g.*, *Johnson*, 225 F.3d at 373; *Jenkins*, 400 F.3d at 878; *Livingston*, 339 F.3d at 559; *Snowden*, 290 F.3d at 638-39.

Resolution of this conflict is of paramount importance because, as noted, the FAA governs the rights of tens millions of individuals and businesses across the country that have adopted agreements to arbitrate as an alternative to litigation in a broad range of transactions affecting interstate commerce. The enforceability of these agreements to arbitrate individually has been, and is being, challenged across the country based on *Discover Bank* and *Shroyer*, decisions which attempt to mask "judicial hostility" to individual arbitration under the cover of state-law "unconscionability."

The enforceability of these agreements should not be made to depend on which of the competing interpretations of the FAA has been adopted by a particular state or federal circuit. Accordingly, this Court should grant review in this case to ensure the uniform application of the FAA in an area of fundamental practical importance.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENT.

Review also is warranted because the decision below conflicts with this Court's decisions on the fundamental relationship between the FAA and state-law substantive and procedural policies.

a. As this Court's decisions make plain, the FAA "creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate." *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 25 (1983). Under the FAA, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Id.* at 24-25. That "liberal federal policy favoring arbitration" remains applicable "notwithstanding any state substantive or procedural policies to the contrary." *Id.* at 24.

To be sure, the FAA does not entirely displace state-law contract principles. Rather, Section 2 of the FAA provides that agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Thus, any treatment of arbitration agreements that is different from all other contracts is expressly forbidden, for "[a] state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of § 2." *Perry*, 482 U.S. at 493 n.9; see *Doctor's Assocs.*, 517 U.S. at 684, 687 (state law that required conspicuous disclosure of arbitration agreement preempted because it gave arbitration provisions a "suspect status"). Further, a court may not rely upon a state-law rule that applies to some, but not all, contracts as a basis for refusing to enforce an agreement to arbitrate. See *Southland Corp.* v. *Keating*, 465 U.S. 1, 16 n.11 (1984); *Perry*, 482 U.S. at 489-90.

b. Here, the Ninth Circuit's ruling, which adopts *Shroyer*, 498 F.3d at 984 – and with it *Discover Bank*,

113 P.3d at 1106 – conflicts with this Court's decisions. It conflicts with *Perry* because it is based upon the conclusion that an agreement to arbitrate is unconscionable because it does not provide class-wide procedures that might be available in litigation. That, however, is precisely what *Perry* explained was prohibited by the FAA: Reliance on the "uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable." 482 U.S. at 493 n.9. It further conflicts with *Southland* because it adopts a standard applicable only to certain contracts, rather than a rule generally applicable to "any contract," as a basis for refusing to enforce the parties' agreement to arbitrate. See 465 U.S. at 16 & n.11.

In evaluating whether the FAA permits California law to refuse enforcement of the parties' agreement, the Ninth Circuit never addressed whether Laster could protect her rights under California law through individual arbitration. See, *e.g.*, *Shearson/Am. Express, Inc.* v. *McMahon*, 482 U.S. 220, 232 (1987) ("the streamlined procedures of arbitration do not entail any consequential restriction on substantive rights"). Indeed, the Ninth Circuit's decision in *Shroyer* makes plain that the availability of attorneys' fees and the payment of "the full cost of arbitration" by the defendant are, in that court's view, not relevant to a determination whether individual arbitration is unconscionable. 498 F.3d at 986. The court below followed *Shroyer*'s holding that an agreement to arbitrate individual claims was unconscionable based on the effect that it might have on the actions of third parties. *Id.* (asserting that few plaintiffs would pursue claims on an individual basis).

This Court, however, has explained that arbitration agreements must be enforced without regard to any effect on third parties. In *Moses H. Cone*, this Court explained that "an arbitration agreement must be enforced notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement." 460 U.S. at 20. Likewise, in *Dean Witter Reynolds, Inc.* v. *Byrd*, this Court held that principles of judicial efficiency must give way to the parties' agreement to arbitrate because "federal law *requires* piecemeal resolution when necessary to give effect to an arbitration agreement." 470 U.S. 213, 221 (1985) (internal quotes omitted).

Nor can the decision below be justified on the grounds, relied upon by *Shroyer* and *Discover Bank*, that California law mandates the availability of class-wide procedures for resolution of consumer claims both in litigation *and* arbitration. See *Shroyer*, 498 F.3d at 988 ("'[T]he principle that class action waivers are, under certain circumstances, unconscionable as unlawfully exculpatory is a principle of California law that does not specifically apply to arbitration agreements, but to contracts generally'") (quoting *Discover Bank*, 113 P.3d at 1112). To be sure, a state law that singles out arbitration for disfavored treatment directly violates the FAA. *Doctor's Assocs.*, 517 U.S. at 687. Under this Court's precedent, however, states cannot employ unconscionability principles to remake arbitration as the mirror image of litigation.

To the contrary, under the FAA, "parties are generally free to structure their arbitration agreements as they see fit," and to "specify by contract the rules under which that arbitration will be conducted." *Volt*, 489 U.S. at 479. The FAA favors

arbitration because it provides an alternative to litigation: a party "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). The FAA mandates enforcement of an agreement to arbitrate even where the procedures chosen by the parties are different from those in litigation.

Insistence by states that arbitration replicate litigation undermines the role of arbitration as an alternative means of dispute resolution. Indeed, in *Discover Bank*, the California Supreme Court candidly acknowledged that its requirement of class-wide procedures in arbitration involving consumers would create a "hybrid" form of dispute resolution that "'would entail a greater degree of judicial involvement than is normally associated with arbitration.'" 113 P.3d at 1106. Under the FAA, Congress' "clear intent" was "to move the parties to an arbitrable dispute *out of court and into arbitration* as quickly and easily as possible." *Moses H. Cone*, 460 U.S. at 22 (emphasis added). State law cannot be used to pull parties who have agreed to arbitrate back into court.

In short, review also is warranted because the decision below conflicts with this Court's decision explaining that the FAA does not permit state contract law to condition enforcement of agreements to arbitrate on the parties' adoption of the procedures already available in litigation. *E.g.*, *Perry*, 482 U.S. at 493 n. 9; *Southland*, 465 U.S. at 16 & n.11.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 23, 2007

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

[Filed Oct. 25, 2007]

No. 06-55010

JENNIFER L. LASTER; ANDREW THOMPSON; ELIZABETH VOORHIES, on behalf of themselves and all others similarly situated and on behalf of the general public,

Plaintiffs-Appellees,

v.

T-MOBILE USA, INC.; OMNIPOINT COMMUNICATIONS, INC., a Delaware corporation dba T-MOBILE,

Defendants-Appellants,

And

VERIZON COMMUNICATIONS, INC., a Delaware corporation; CELLCO PARTNERSHIP, a Delaware corporation dba VERIZON WIRELESS; VERIZON WIRELESS (VAW) LLC, a Delaware limited liability company, dba VERIZON WIRELESS; AIRTOUCH CELLULAR, a Delaware limited liability company, dba VERIZON WIRELESS; CINGULAR WIRELESS LLC, a Delaware limited liability company; GO WIRELESS, a California corporation; NEW CINGULAR WIRELESS PCS, dba CINGULAR WIRELESS,

Defendants.

Submitted Oct. 16, 2007*

Appeal from the United States District Court for the Southern District of California; Dana M. Sabraw, *District Judge*, Presiding. D.C. No. CV-05-01167-DMS.

Before: PREGERSON, HAWKINS, and FISHER, *Circuit Judges*.

MEMORANDUM**

T-Mobile USA, Inc., Omnipoint Communications, Inc., and TMO CA/NV, LLC (collectively, "Appellants") appeal from the district court's order denying their motion to compel arbitration. We affirm.

Although Appellants argue that their arbitration provision is not procedurally or substantively unconscionable under California law, the Appellants' agreement—which requires customers to waive class action and bring claims only in an individual capacity—is not substantively distinguishable from the Cingular arbitration agreement this court held unconscionable in *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 2007 WL 2332068, at *5-9 (9th Cir. 2007).

Appellants argue their agreement is not procedurally unconscionable because customers accepted the arrangement from the outset and could have elected a different mobile phone company; however,

* The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

** This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

this court specifically rejected the "marketplace alternatives" rationale in *Shroyer*, *id.* at *7-8, and California courts have done the same, *Gatton v. T-Mobile USA, Inc.*, 152 Cal. App. 4th 571, 582-85 (2007).

Shroyer also expressly and conclusively rejected the argument that California law is preempted by the Federal Arbitration Act ("FAA"), 498 F.3d 976, 2007 WL 2332068, at *9-15, and we lack the authority to revisit the decision of a prior three-judge panel. *Miller v. Gammie*, 335 F.3d 889, 899-900 (9th Cir. 2003) (en banc). Appellants' attempts to circumvent this rule are unavailing, as this is not a case where the prior panel simply assumed California law applied without discussing the preemptive effect of the FAA. *Cf. Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1288 (9th Cir. 1985) (prior panel assumed Commerce Clause applied to Guam without discussing the issue); *Matter of Baker*, 693 F.2d 925, 925-26 (9th Cir. 1982) (prior panel exercised jurisdiction and parties did not contest the issue). Even if *Shroyer* did not address the specific arguments Appellants would like to make, there is no doubt that it clearly and explicitly ruled on the contested preemption issue.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
S.D. CALIFORNIA

No. 05 CV 1167 DMS(AJB)

JENNIFER L. LASTER; et al.,
Plaintiffs,

v.

T-MOBILE USA, INC., et al.,
Defendants.

Nov. 30, 2005

ORDER: (1) DENYING T-MOBILE AND CINGULAR WIRELESS' MOTION TO COMPEL ARBITRATION AND TO STAY PROCEEDINGS; (2) GRANTING DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' UCL AND FAL CLAIMS WITHOUT PREJUDICE; AND (3) GRANTING DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' CLRA CLAIM FOR DAMAGES WITH PREJUDICE

[Docs. Nos. 24, 28, 32, 36]

SABRAW, *District Judge*.

In this putative class action, Plaintiffs assert that Defendants—cellular phone companies and other entities involved with the sale of wireless telecommunication services—have engaged in the unfair and deceptive practice of charging consumers sales tax on the full retail value of cellular phones that were advertised as "free" or at substantial discounts, in violation of California's Unfair Competition Law

("UCL"), Cal. Bus. & Prof.Code § 17200, *et. seq.*, and False Advertising Law ("FAL"), Cal. Bus. & Prof. Code § 17500, *et. seq.* In addition, based on these alleged violations, Plaintiffs seek damages and injunctive relief under the Consumer Legal Remedies Act ("CLRA"), Cal. Civ.Code § 1770, *et. seq.*

Presently before the Court are two motions. First, Defendants T-Mobile USA, Inc. ("T-Mobile") and Cingular Wireless ("Cingular") have filed separate motions to compel Plaintiffs Jennifer L. Laster ("Laster") and Elizabeth Voorhies ("Voorhies") to arbitration, based on the arbitration clauses contained in their wireless service contracts. In addition, Defendants Verizon Wireless and Go Wireless, Inc. have filed a joint motion under Fed.R.Civ.P. 12(b)(6) to dismiss Plaintiffs' First Amended Class Action Complaint ("FAC") for failure to state a claim. Defendants T-Mobile and Cingular have joined that motion. On October 28, 2005, the Court heard oral argument on both motions. For the reasons discussed below, the Court denies T-Mobile and Cingular's motions to compel arbitration, and grants Defendants' collective motion to dismiss Plaintiffs' UCL and FAL claims without prejudice. Further, the Court grants Defendants' motion to dismiss Plaintiffs' CLRA damages claim with prejudice.

I.

FACTUAL AND PROCEDURAL BACKGROUND

Defendants are engaged in the business of marketing and selling wireless telecommunications products, including cellular phones, accessories and service. These products are often sold as part of a "bundled" transaction, whereby the consumer receives a free or significantly discounted cellular phone, in exchange for agreeing to a wireless service

contract for a specified duration; however, when Defendants offer the free or substantially discounted phone as part of a bundled transaction, they generally charge consumers sales tax (approximately 7.75%) based on the full retail value of the phone. Plaintiffs contend this practice is improper because a phone advertised as "free" should not include sales tax, and a phone advertised at a substantial discount should include only the sales tax based on the phone's discounted price, rather than its full retail value.

On November 14, 2004, Voorhies entered into bundled transaction to obtain a new cellular phone and wireless service from Cingular, through its authorized agent, Go Wireless, in Poway, California. (Plaintiffs' FAC at ¶ 5.) In conjunction with the purchase of the service package, Voorhies was not charged any amount for the phone. (*Id.*) However, Defendants charged Voorhies a total of $10.31 in sales tax, based on the retail value of the phone. (*Id.*) At the time Voorhies entered into the transaction, she was provided with a copy of Cingular's one page "Wireless Service Agreement," which provides in its "Contract Provisions" section:

> This Agreement includes all the provisions of Cingular's current [T]erms of [S]ervice form FMS TC P 1104 0055 E, incorporated herein by reference, *including a binding arbitration clause.* It also includes and incorporates additional provisions contained in a separate rate plan or other brochure(s) describing the services to which I subscribed ("Rate Plan Brochure"). I agree to all these contract provisions.

(*See* Green Decl. at ¶¶ 6 & 7; Service Agreement, attached thereto) (emphasis added).

The Service Agreement further provides:

> I HAVE READ, UNDERSTAND, AND AGREE TO BE BOUND BY THIS AGREEMENT WITH ITS TERMS OF SERVICE AND RATE PLAN BROCHURE (including Changes to Terms and Rates, Limitation of Liability and *Arbitration*).

(*See id.*) (emphasis added).

Voorhies also received at that time a copy of Cingular's "Terms of Service," which is a thirteen page document detailing the terms and conditions of Cingular's service. (Green Decl. at ¶ 10.) The Terms of Service, at page 10, includes a section entitled "Arbitration," which purports to waive the consumer's rights to (a) file claims in a court of law against Cingular, and (b) participate in a class action lawsuit against Cingular. Specifically, Cingular's arbitration clause provides:

> CINGULAR and you . . . agree to arbitrate all disputes and claims (including ones that already are the subject of litigation) arising out of or relating to this Agreement, or to any prior oral or written agreement, for Equipment or services between CINGULAR and you . . . . A party who intends to seek arbitration must first send to the other, by certified mail, a written Notice of Intent to Arbitrate ("Notice") . . . . If we do not reach agreement to resolve the claim within 30 days after the Notice is received, you or Cingular may commence an arbitration proceeding. After Cingular receives notice at the Arbitration Notice Address that you have commenced arbitration, it will promptly reimburse you for your payment of the filing fee. . . . Cingular will pay all [American Arbitration Association] filing, administration

> and arbitrator fees for any arbitration initiated in accordance with the notice requirements above . . . . If the arbitrator grants relief to you that is equal to or greater than the value of your Demand, Cingular shall reimburse you for your reasonable attorneys' fees and expenses incurred in the arbitration . . . . You agree that, by entering into this Agreement, you and Cingular are waiving the right to trial by jury . . . . You and Cingular agree that YOU AND CINGULAR MAY BRING CLAIMS AGAINST THE OTHER ONLY IN YOUR OR ITS INDIVIDUAL CAPACITY, and not as a plaintiff or class member in any purported class or representative proceeding.

(Cingular's Terms of Service at 10-12, attached to Green Decl.) (emphasis in original).

After Voorhies received copies of the Wireless Service Agreement and Terms of Service, she was—pursuant to Cingular's procedures for activation of cellular service—directed to call a number provided by Cingular for electronic activation of phone service. (Green Decl. at ¶ 11.) Voorhies was then prompted to execute an electronic signature by selecting the "Yes" option using her telephone keypad in response to the statement: "You agree to the terms as stated in the Wireless Service Agreement and Terms of Service." (*Id.* at ¶ 12.) If Voorhies did not respond "Yes" to this question, the system would automatically decline her service contract, and her phone would not be activated. (*Id.*) Voorhies agreed to the terms, and her phone was activated. (*Id.* at ¶ 13.)

On February 23, 2005, Laster entered into a bundled transaction with T-Mobile at its Mission Valley Center Store in San Diego, California,

whereby she purchased a new phone and activated cellular service. (Plaintiffs' FAC at ¶ 3; Chang Decl. at ¶ 2.) When Laster entered into the transaction, she signed a one page Service Agreement which identified her plan rate and the equipment she purchased. (Chang Decl. at ¶ 2.) The Service Agreement neither mentioned arbitration nor incorporated by reference such a provision. After Laster signed the agreement, she received a one page transaction receipt which indicated, among other things, that while T-Mobile did not charge any amount for the phone, it was charging $28.22 for sales tax based on the full retail value of the phone. (*Id.*)

In addition to receiving a new phone, Laster was provided with a copy of T-Mobile's fifty-two page "Welcome Guide", which was placed inside the sealed box accompanying her new phone. (*Id.* at 3.) The Welcome Guide includes information about the phone's features and service, as well as the "Terms and Conditions" of its Service Agreement. Similar to Cingular, T-Mobile's Terms and Conditions includes an arbitration clause and waiver of class action participation. T-Mobile's arbitration clause provides:

> Mandatory Arbitration; Dispute Resolution. YOU WILL FIRST NEGOTIATE WITH U.S. IN GOOD FAITH TO SETTLE ANY CLAIM OR DISPUTE BETWEEN YOU AND U.S. IN ANY WAY RELATED TO OR CONCERNING THE AGREEMENT, OR OUR PROVISION TO YOU OF GOODS, SERVICES OR UNITS ("CLAIM"). . . . . IF YOU DO NOT REACH AGREEMENT WITH U.S. WITHIN 30 DAYS, INSTEAD OF SUING IN COURT, YOU AGREE THAT ANY CLAIM MUST BE SUBMITTED TO FINAL, BINDING ARBITRATION WITH THE

> AMERICAN ARBITRATION ASSOCIATION ("AAA") . . . . You will pay your share of the arbitrator's fees except: (a) for claims less than $25, we will pay all arbitrator's fees and (b) for claims between $25 and $1000, you will pay $25 for the arbitrator's fee. You and we agree to pay our own other fees, costs and expenses including those for counsel, experts, and witnesses. YOU AND WE ACKNOWLEDGE AND AGREE THAT THIS SEC[TION] . . . WAIVES ANY RIGHT TO A JURY TRIAL, OR PARTICIPATION AS A PLAINTIFF OR A CLASS MEMBER IN A CLASS ACTION.

(T-Mobile's Welcome Guide, § 4 (Terms and Conditions) at ¶¶ 3 & 4, attached as Exhibit D to Chang Decl.) (emphasis in original). Laster alleges that before receiving T-Mobile's Welcome Guide, she was unaware of T-Mobile's arbitration clause. (Plaintiffs' Opposition to T-Mobile's Motion to Compel at 7.)

In May of 2005, Laster, Voorhies, and an additional named Plaintiff in this lawsuit, Andrew Thompson, each filed suits in the Superior Court of San Diego County. Subsequently, two of the cases were removed to this Court pursuant to the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. §§ 1711, *et. seq*. The third action against Defendants was dismissed without prejudice.

On August 12, 2005, Plaintiffs filed their FAC with this Court against Defendants. Plaintiffs allege for themselves and on behalf of all consumers who purchased a cellular phone as part of a bundled transaction, that Defendants' practice of advertising "free" or significantly discounted phones, while charging sales tax on the full retail value of the phones, constitutes misleading and unlawful business acts and practices

under California's FAL, UCL and CLRA. Defendants challenge the FAC through their motions to compel arbitration and to dismiss. These motions are addressed below.

II.

DISCUSSION

A. Motion to Compel Arbitration

1. Legal Standard

The Federal Arbitration Act ("FAA") governs arbitration agreements in contracts involving transactions in interstate commerce. 9 U.S.C. § 1; *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n. 32, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). Congress intended courts to construe commerce as broadly as possible. *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 719 (9th Cir.1999). Pursuant to Section 2 of the FAA, arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds that exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. In determining whether to compel a party to arbitration, a district court may not review the merits of the dispute; rather, the court must limit its inquiry to: (1) whether a valid agreement to arbitrate exists, and, if it does (2) whether the agreement encompasses the dispute at issue. *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir.2000). Finally, a court interpreting an arbitration agreement must give due regard to the federal policy favoring arbitration; ambiguities as to the scope of the arbitration clause are resolved in favor of arbitration. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62, 115 S.Ct. 1212, 131 L.Ed.2d 76 (1995); *AT & T Techs. Inc. v. Comm. Workers of America*, 475 U.S. 643, 650, 106

S.Ct. 1415, 89 L.Ed.2d 648 (1986) ("in the absence of any express provision excluding a particular grievance from arbitration . . . only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail.")

T-Mobile and Cingular contend Laster and Voorhies are bound by the terms of the arbitration agreements contained in their wireless service agreements, and therefore, this Court is not the proper forum to adjudicate their claims. Laster and Voorhies respond by arguing that the arbitration clauses are not enforceable against them because the subject provisions are unconscionable.

2. Unconscionability

While federal policy favors arbitration agreements, federal courts rely on state law when addressing issues of contract validity and enforceability. *Ticknor v. Choice Hotels Int'l, Inc.*, 265 F.3d 931, 936-37 (9th Cir.2001). Thus, generally applicable contract defenses such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening Section 2 of the FAA. *Ticknor*, 265 F.3d at 937 (citing *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996)). On a motion to compel arbitration, the trial court does not determine whether the contract as a whole is unconscionable. Instead, the court is limited to determining whether the arbitration clause itself is unconscionable. *See Gray v. Conseco, Inc.*, 2000 WL 1480273 (C.D.Cal.2000).

The unconscionability analysis begins with an inquiry into whether the contract is one of adhesion. *See Armendariz v. Foundation Health Psychcare Services*, 24 Cal.4th 83, 113, 99 Cal.Rptr.2d 745, 6

P.3d 669 (Cal.2000). An adhesion contract is a "standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it." *Id.* at 113, 99 Cal.Rptr.2d 745, 6 P.3d 669 (citation omitted). An adhesion contract is unconscionable when *both* procedural and substantive unconscionability are present. *Id.* at 114, 99 Cal.Rptr.2d 745, 6 P.3d 669. Procedural and substantive unconscionability, however, "need not be present in the same degree." *Id.* When great substantive unconscionability is present, less procedural unconscionability is required before the agreement will be invalidated. *Id.* Finally, a party challenging an arbitration agreement has the burden to prove both procedural and substantive unconscionability. *Crippen v. Central Valley RV Outlet, Inc.*, 124 Cal.App.4th 1159, 1165, 22 Cal.Rptr.3d 189 (2004).

a. Procedural Unconscionability

Procedural unconscionability concerns the manner in which the contract was negotiated and the circumstances of the parties at that time. *A & M Produce Co. v. FMC Corp.*, 135 Cal.App.3d 473, 491, 186 Cal.Rptr. 114 (1982). The procedural element of unconscionability focuses on two factors: oppression and surprise. *Id.* at 486, 186 Cal.Rptr. 114. The oppression component arises from an inequality of bargaining power of the parties to the contract and an absence of real negotiation or a meaningful choice on the part of the weaker party. *California Grocers Assn. v. Bank of America*, 22 Cal.App.4th 205, 214, 27 Cal.Rptr.2d 396 (1994). "Surprise involves the extent to which the terms of the bargain are hidden in a 'prolix printed form' drafted by a party in a superior

bargaining position." *Crippen*, 124 Cal.App.4th at 1165, 22 Cal.Rptr.3d 189 (citation omitted).

T-Mobile and Cingular do not dispute that the arbitration agreements between the parties were part of a non-negotiable form contract. Further, they do not challenge Plaintiffs' argument that a disparity in bargaining power exists between the parties. However, T-Mobile and Cingular argue that Laster and Voorhies cannot establish that the agreements are procedurally unconscionable due to "oppression" because they were not compelled to accept the terms contained in the service contracts; Laster and Voorhies were "able to choose from a host of wireless carriers offering services in a given market"—including carriers that do not insist on arbitration of disputes. (T-Mobile's Motion to Compel at 10-11; Cingular's Motion to Compel at 7.) Defendants cite *Morris v. Redwood Empire Bancorp*, 128 Cal.App.4th 1305, 1319-20, 27 Cal.Rptr.3d 797 (2005), for the proposition that "the 'oppression' factor of the procedural element of unconscionability may be defeated, if the complaining party has a meaningful choice of reasonably available sources of supply from which to obtain the desired goods and services free of the terms claimed to be unconscionable." (Cingular's Motion to Compel at 6.) The problem with this argument, however, is that the Ninth Circuit has rejected it.

In *Ting v. AT&T*, 319 F.3d 1126, 1149 (9th Cir.2003), the Ninth Circuit addressed this very argument. There, AT & T mailed a Consumer Services Agreement (CSA) to its customers along with the customer's monthly bill and other materials. The CSA purported to mandate arbitration of claims and bar customers from pursuing claims against AT

& T on a classwide basis. AT & T argued its arbitration provision in the CSA was not procedurally unconscionable because "the third largest carrier, Verizon, had no arbitration agreement in [its] contract and . . . consumers therefore had the option of rejecting AT & T's CSA and switching to a competitor." *Id.* at 1149.

The court in *Ting* dismissed the argument, first noting: "A contract *is* procedurally unconscionable if it is a contract of adhesion, *i.e.*, a standardized contract, drafted by the party of superior bargaining strength, that relegates to the subscribing party only the opportunity to adhere to the contract or reject it." *Ting*, 319 F.3d at 1148-49 (emphasis added) (citing *Flores v. Transamerica HomeFirst, Inc.*, 93 Cal.App.4th 846, 853, 113 Cal.Rptr.2d 376 (2001) ("'A finding of a contract of adhesion is essentially a finding of procedural unconscionability.'")) In addition, the court in *Ting* held: "[E]ven assuming such alternatives matter under California law, *see Armendariz*, . . . (rejecting contention that availability of alternative sources of supply affected the procedural unconscionability analysis), it nonetheless fails to overcome the district's court's well-founded conclusion that the CSA is a procedurally unconscionable contract [because AT & T imposed the CSA on its customers without opportunity for negotiation, modification, or waiver]." *Id.* Accordingly, *Ting* holds: (1) a contract of adhesion is procedurally unconscionable, and (2) even if a court were to consider the availability of alternative sources of supply, the court must evaluate the consumer's opportunity to negotiate the arbitration provision.

Here, it is undisputed Laster and Voorhies were presented with *non-negotiable* form contracts. They

could either accept the contract with arbitration, or reject it. Under *Ting*, such "take it, or leave it" contracts are deemed to be procedurally unconscionable contracts of adhesion. The only question for this Court, therefore, is where on the continuum of procedural unconscionability do the subject agreements fall?[1]

With respect to T-Mobile, the one page Service Agreement Laster signed does *not* include any reference to arbitration or waiver of class action participation. Rather, Laster was theoretically notified of the arbitration clause through T-Mobile's fifty-two page "Welcome Guide", which was placed inside the sealed box containing her new phone. Laster claims she neither signed nor acknowledged the arbitration provision, because she never knew it existed. (Opposition to Motion to Compel at 7.) Nevertheless, T-Mobile contends Laster accepted the terms of arbitration by activating her phone because she "had time to review and understand" the Welcome Guide and its arbitration provision, and "she was allowed to return her phone and cancel her T-Mobile service within 14 days, with no penalty." (T-Mobile's Motion to Compel at 4.)

Under these circumstances, Laster had no meaningful opportunity to negotiate the terms of the

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[1] Defendants cite *Crippen*, 124 Cal.App.4th at 1165, 22 Cal.Rptr.3d 189, for the proposition that "there is no general rule that a form contract used by party for many transactions is procedurally unconscionable. Rather, '[p]rocedural unconscionability focuses on the manner in which the disputed clause is presented to the party in the weaker bargaining position.'" (citation omitted). This holding, however, is contrary to the holding in *Ting*. Nonetheless, *Crippen's* holding remains relevant to the determination of the *level* of procedural unconscionability.

service contract before purchasing the phone. In other words, she had no opportunity to switch to another competitor until *after* she purchased the phone. On this record, it appears Laster's ability to "negotiate" depended upon her ability to discover the arbitration provision on her own and then cancel her service within 14 days of purchasing and activating her phone. The manner in which the T-Mobile's arbitration provision was presented to Laster clearly suggests procedural unconscionability at a heightened level.

Cingular's arbitration clause, on the other hand, presents a closer call. In contrast to Laster, Voorhies was provided with both Cingular's Service Agreement (which specifically references arbitration) and its Terms of Service *at the time* she purchased the phone. As Cingular notes, "At that time, Voorhies had neither invested in a telephone nor become reliant upon the telephone number obtained when she entered into her agreement." (Cingular's Motion to Compel at 8.) In other words, Voorhies could, at that point, elect to "leave it" and go with a competitor, such as Verizon.

However, under *Ting*, Cingular nonetheless presented Voorhies with a take-it-or-leave-it form contract that is deemed to be adhesive and thereby, procedurally unconscionable. Similar to Laster, Voorhies had no real opportunity to "negotiate" the arbitration provision, as it was non-negotiable. She was, however, able to negotiate the transaction in the sense that she could at an early stage reject Cingular's terms and choose a competitor. As Cingular concedes, "At most, [under these circumstances] adhesiveness . . . puts Cingular's contracts on the low end of the spectrum of procedural unconscionability."

(Cingular's Motion to Compel at 7.) This Court would agree.

T-Mobile and Cingular next argue that Laster and Voorhies fail to show the "surprise" element of procedural unconscionability. In support, Defendants argue the terms of the arbitration agreements are adequately disclosed in their service contracts. (T-Mobile's Motion to Compel at 11; Cingular's Motion to Compel at 8.)

As noted, Laster was not made aware of the terms of the arbitration clause until after she had purchased the phone. The surprise element is therefore clearly established by Laster against T-Mobile.

Cingular argues, however, the "surprise" element is lacking because it "gave its arbitration provisions special prominence in its [Service] Agreement." (Cingular's Motion to Compel at 8.) While it is true Cingular's Service Agreement provides *notice* of arbitration, the agreement fails to mention the terms of arbitration or its classwide arbitration bar. In addition, the actual arbitration clause and class action waiver can only be determined by the customer by reading a separate document—specifically, pages ten through twelve of Cingular's thirteen page Terms of Service booklet. A modicum of surprise therefore exists under these circumstances.

In sum, for the reasons stated, T-Mobile and Cingular's arbitration provisions are procedurally unconscionable. To avoid enforcement, however, Laster and Voorhies also must establish substantive unconscionability.

b. Substantive Unconscionability

Plaintiffs argue T-Mobile and Cingular's arbitration clauses are substantively unconscionable because they include a waiver of class action rights, citing the recent California Supreme Court decision in *Discover Bank v. Superior Court of Los Angeles*, 30 Cal.4th 148 (Cal.2005). Defendants counter that: (1) *Discover Bank* does not hold that all such arbitration provisions are unconscionable; (2) under *Discover Bank's* test for substantive unconscionability, Plaintiffs fail to show the arbitration provisions in dispute are unconscionable; and (3) even if this Court were to conclude that *Discover Bank* invalidates class action waivers in all consumer arbitration provisions, that holding would be preempted by Section 2 of the FAA.

In *Discover Bank*, defendant, a credit card company, sent an arbitration agreement (as an amendment to its existing customer service agreement) in a "bill stuffer" along with its customers' monthly invoices. The arbitration agreement included a waiver of classwide arbitration. Plaintiffs later initiated a class action lawsuit, and Discover Bank moved to compel arbitration. The California Supreme Court held that a waiver of classwide arbitration in a consumer contract of adhesion may be unconscionable under certain circumstances. Specifically, the court concluded:

> We do not hold that all class action waivers are necessarily unconscionable. But when the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large

> numbers of consumers out of individually small sums of money, then, at least to the extent the obligation at issue is governed by California law, the waiver becomes in practice the exemption of the party 'from responsibility for [its] own fraud, or willful injury to the person or property of another.' (Civ.Code, § 1668.) Under these circumstances, such waivers are unconscionable under California law and should not be enforced.

Discover Bank, 30 Cal.4th at 162-63.

Accordingly, under *Discover Bank*, arbitration provisions that contain class action waivers are not *per se* unconscionable. Instead, a classwide arbitration bar is unconscionable only if two factors are present: (1) the class action waiver is contained in a consumer contract of adhesion, in which small amounts of damages are at issue; and (2) it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money.

Applying *Discover Bank's* two-prong test to the present facts leads to the conclusion that the arbitration provisions are substantively unconscionable. As noted, the arbitration clauses are contracts of adhesion because they are non-negotiable, presenting the consumer with only a take-it-or-leave-it option. Further, the dispute between the parties here involves individually small amounts of money—that is, the sales tax (approximately 7.75%) charged to the consumer, based on the retail value of a cellular phone. Thus, the first prong of *Discover Bank's* unconscionability test is satisfied.

T-Mobile argues Plaintiffs do not prevail under the second prong of *Discover Bank* because they fail to show T-Mobile deliberately cheated large numbers of consumers out of individually small sums of money. (T-Mobile's Motion to Compel at 16.) *Discover Bank*, however, does not require a plaintiff to show that a defendant *actually* carried out a scheme to cheat consumers out of money. Instead, *Discover Bank* holds that, "when it is *alleged* that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then . . . the waiver becomes in practice the exemption of the party from responsibility for [its] own fraud, or willful injury to the person or property of another." *Discover Bank*, 30 Cal.4th at 162-63. (emphasis added). In essence, for a classwide litigation bar to be considered substantively unconscionable, a plaintiff need only *allege* that a defendant engaged in a scheme to cheat consumers out of small sums of money. Here, Plaintiffs' allege Defendants' practice of advertising "free" or substantially discounted phones, while charging consumers sales tax on the full retail value of the phone, constitutes a scheme to mislead consumers. Accordingly, their allegations are sufficient to satisfy the second prong of *Discover Bank's* substantive unconscionability test.

Cingular raises the additional argument that because its arbitration provision provides for the full payment of arbitration costs, as well as reasonable attorney's fees to potential plaintiffs, "'the class-action waiver in its arbitration provision does not serve to insulate [it] from liability that otherwise would be imposed under California law'. . . and hence is not substantively unconscionable under *Discover Bank*." (Cingular's Motion to Compel at 9-10,13.)

Thus, Cingular essentially argues its arbitration provision allows potential plaintiffs to pursue claims against them under a system where the parties are on equal footing; because Cingular would pay a prevailing plaintiff's attorney's fees, it would have no incentive to defend itself in arbitration against a meritorious claim. (*Id.* at 12.)

The court in *Discover Bank* considered this argument, and rejected it, holding: "Nor are we persuaded by the rationale stated by some courts that the potential availability of attorney fees to the prevailing party in arbitration or litigation ameliorates the problem posed by such class action waivers . . . . There is no indication . . . attorney fees are an adequate substitute for the class action or arbitration mechanism."[2] *Discover Bank*, 30 Cal.4th at 162.

Because T-Mobile and Cingular's service contracts are non-negotiable form contracts, involving an

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[2] The court in *Ting*, 319 F.3d 1126, which presaged *Discover Bank*, also was concerned with classwide bars because such bars potentially could convert arbitration into a one-sided forum favoring the stronger party. "'Although parties are free to contract for asymmetrical remedies and arbitration clauses of varying scope . . . the doctrine of unconscionability limits the extent to which a stronger party may, through a contract of adhesion, impose the arbitration forum on the weaker party *without accepting that forum for itself.*'" *Id.* at 1149 (citing *Armendariz*, 24 Cal.4th 83, 99 Cal.Rptr.2d 745, 6 P.3d 669) (emphasis added). Because credit card companies typically do not sue their customers in class-action lawsuits, the *Ting* court concluded the classwide bar provision was manifestly one-sided and thus, substantively unconscionable. *Id.* at 1150. The *Ting* court's warning that such provisions may not be sufficiently bilateral, permeates *Discover Bank's* reasoning in its rejection of the classwide bar provision it was analyzing.

alleged scheme to cheat large numbers of consumers out of small sums of money, the arbitration clauses are substantively unconscionable. Further, because Laster and Voorhies have established the arbitration provisions are both procedurally and substantively unconscionable to a sufficient degree, the Court concludes the provisions are not enforceable against them.[3]

3. Preemption

T-Mobile and Cingular argue, in the alternative, that should the Court find the arbitration clauses substantively unconscionable, this Court still must compel Laster and Voorhies to arbitration because the holding in *Discover Bank* is preempted by the FAA. Section 2 of the FAA provides that "[a]n agreement shall be valid, irrevocable, and enforceable, save upon such grounds that exist at law or in equity for the revocation of *any* contract." 9 U.S.C. § 2. (emphasis added). Likewise, in *Perry v. Thomas*, 482 U.S. 483, 492-93 n. 9, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987), the United States Supreme Court held that "an agreement to arbitrate is valid, irrevocable, and enforceable, as a matter of federal law, save upon such grounds as exist at law or in equity for the revocation of *any* contract." (emphasis added.) T-Mobile and Cingular argue that "because the test set forth in *Discover Bank* is not a rule of general applicability given that it only applies to a limited subset of arbitration agreements and disputes"—the unconscionability test articulated in *Discover Bank* is

[3] In light of the holding that Defendants' arbitration clauses are not enforceable, the Court declines to address the arguments regarding the scope of the arbitration clauses.

preempted by § 2 of the FAA. (T-Mobile's Motion to Compel at 17; Cingular's Motion to Compel at 13.)

In *Discover Bank*, the court noted a determination that a classwide bar is unconscionable is not preempted by § 2 of the FAA, because such a determination involves principles of state law regarding the "validity, revocability, and enforceability of contracts generally[.]" *Discover Bank*, 30 Cal.4th at 165. "'Under section 2 of the FAA, a state court may refuse to enforce an arbitration agreement based on generally applicable contract defenses, such as fraud, duress, or unconscionability.'" *Id.* (citations omitted.) *See also Ting*, 319 F.3d at 1150, n. 15 ("Because unconscionability is a generally applicable contract defense, it may be applied to invalidate an arbitration agreement without contravening § 2 of the FAA."). The concept of unconscionability, therefore, may be employed as a principle of general applicability to invalidate an arbitration agreement without contravening § 2 of the FAA. Accordingly, the holding of *Discover Bank* is not preempted by § 2 of the FAA.

B. Motion to Dismiss

1. Legal Standard

Under Federal Rule of Civil Procedure 12(b)(6), a district court must dismiss a complaint if it fails to state a claim upon which relief can be granted. The question presented by a motion to dismiss is not whether the plaintiff will prevail in the action, but whether the plaintiff is entitled to offer evidence in support of the claim. Fed.R.Civ.P. 12(b)(6). *See Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974), *overruled on other grounds by Davis v. Scherer*, 468 U.S. 183, 104 S.Ct. 3012, 82

L.Ed.2d 139 (1984). In answering this question, the Court must assume that the plaintiff's allegations are true and must draw all reasonable inferences in plaintiff's favor. *See Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir.1987). Even if the face of the pleadings suggests that the chance of recovery is remote, the Court must allow the plaintiff to develop the case at this stage of the proceedings. *See United States v. City of Redwood City*, 640 F.2d 963, 966 (9th Cir.1981). If the Court dismisses the complaint, it must then decide whether to grant leave to amend. The Ninth Circuit has "repeatedly held that a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir.2000) (citations and internal quotation marks omitted).

Defendants seek dismissal of Plaintiffs' FAC on four grounds: (1) Plaintiffs lack standing to bring their claims under California's UCL and FAL because they fail to adequately plead actual reliance and injury in fact; (2) Plaintiffs cannot allege false or deceptive advertising as a matter of law because consumers are expected to know that California law requires sales tax to be added to advertised items; (3) Plaintiffs' claim for restitution under the UCL and FAL fails because Defendants remitted the taxes collected from consumers to the State Board of Equalization; and (4) Plaintiffs' claim for damages under the CLRA should be dismissed because they fail to allege proper notice of their claim as required by California Civil Code § 1782. These arguments are addressed below.

2. Plaintiffs' UCL and FAL Claims

Section 17200 of the California Business and Professions Code defines "unfair competition" as "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by [the FAL]." Cal. Bus. & Prof. § 17200. By defining unfair competition to include any "unlawful . . . business act or practice", the UCL permits violations of other laws to be treated as unfair competition that are independently actionable. *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal.4th 163, 180, 83 Cal.Rptr.2d 548, 973 P.2d 527 (Cal.1999). As such, any violation of the FAL necessarily violates the UCL. *Committee on Children's Television, Inc. v. General Foods Corp.*, 35 Cal.3d 197, 210, 197 Cal.Rptr. 783, 673 P.2d 660 (Cal.1983).

The FAL, which is codified at Section 17500, provides: "[i]t is unlawful for any person . . . corporation or association, or any employee thereof . . . to disseminate or cause to be so made or disseminated [,] any such statement as part of a plan or scheme with the intent not to sell that personal property or those services, professional or otherwise, so advertised at the price stated therein, or as so advertised." Cal. Bus. & Prof. § 17500. California courts have noted that the FAL prohibits "not only advertising which is false, but also advertising which [,] although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public." *Leoni v. State Bar*, 39 Cal.3d 609, 626, 217 Cal.Rptr. 423, 704 P.2d 183 (Cal.1985).

Proposition 64, which was approved by California voters on November 2, 2004, amended certain provi-

sions of the UCL and FAL. Before Proposition 64 passed, an uninjured private party could bring a UCL (or FAL) action on behalf of the "general public," and could obtain remedies on behalf of non-parties.

Proposition 64, however, amended Section 17204 of the UCL regarding private plaintiffs to read: "Actions for any relief pursuant to this chapter shall be prosecuted exclusively . . . by any person who has suffered injury in fact and has lost money or property as a result of such unfair competition." Cal. Bus. & Prof.Code § 17204. Section 17203, which was also amended by Proposition 64, now provides, with respect to representative private plaintiffs: "Any person may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements of Section 17204 and complies with Section 382 of the Code of Civil Procedure. . . ." Cal. Bus. & Prof.Code § 17203.

Accordingly, after Proposition 64, a person seeking to represent claims on behalf of others must show that (1) she has suffered actual injury in fact, and (2) such injury occurred as a result of the defendant's alleged unfair competition or false advertising. For the reasons set forth below, Plaintiffs adequately allege injury in fact, but fail adequately to allege causation.

With respect to the first prong—injury in fact—Plaintiffs claim they entered into a bundled transaction with Defendants whereby they purchased both a phone and cellular service, and in doing so, were provided with a phone that was falsely advertised as "free" or substantially discounted, when in fact, they were required to pay the sales tax on the full retail value. (FAC at ¶¶ 23, 24, 25, 26 & 31.) Plaintiffs, in essence, contend putative class members were

injured by Defendants' "bait-and-switch" practices; that is, consumers were lured in with advertisements for free or deeply discounted phones, yet once in the store, they were charged sales tax based on the full retail value of the phone. (FAC ¶¶ 26 & 31.) Plaintiffs further contend that if Defendants were faithful to their advertisements, they would have absorbed the tax. Instead, according to Plaintiffs, Defendants illicitly shifted the tax burden to their customers ("fleeced" them) once such customers had taken the time and effort to respond to the deceptive advertisements. (*Id.*) Such allegations sufficiently allege an injury in fact.[4]

Plaintiffs, however, do not include *any* allegations in their FAC that they relied on Defendants' advertisements in entering into the transactions. While Plaintiffs meticulously describe the allegedly misleading advertisements (as later described in Plaintiffs' pleadings, a "bait-and-switch" leading to a "fleece"), none of the named Plaintiffs allege that they saw, read, or in any way relied on the advertisements; nor do they allege that they entered into the transaction *as a result* of those advertisements.

---

[4] For these reasons, the Court also rejects Defendants' argument that Plaintiffs cannot allege false or deceptive advertising as a matter of law. *See* Defendants' Motion to Dismiss at § IV.A, where Defendants argue they were both required to calculate sales tax on the full retail price of the phones irrespective of any promotional discount and authorized to collect it from consumers. This argument, however, overlooks the essence of Plaintiffs' claim, *i.e.*, that Defendants engaged in "bait-and-switch" practices that deceptively and unfairly shifted the tax burden to consumers.

The language of the UCL, as amended by Proposition 64, makes clear that a showing of causation is *required* as to each representative plaintiff. ("Actions for any relief . . . shall be prosecuted exclusively . . . by any person who has suffered *injury in fact* and has lost money or property *as a result* of such unfair competition." Cal. Bus. & Prof.Code § 17204 (emphasis added)). Because Plaintiffs fail to allege they actually relied on false or misleading advertisements, they fail to adequately allege causation as required by Proposition 64. Thus, under §§ 17203 and 17204, Plaintiffs lack standing to bring their UCL and FAL claims. Plaintiffs' claims are dismissed with leave to amend to address these deficiencies.[5]

3. Plaintiffs' CLRA Claim

Defendants also seek dismissal of Plaintiffs' claim for damages under the CLRA because they failed to give proper notice to Defendants of their CLRA claim, as required by California Civil Code § 1782. Section 1782(a) provides:

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[5] Defendants also argue Plaintiffs improperly "attempt to pass off as a UCL restitution claim that is effectively a damages claim for misrepresentation." (Defendants' Reply at 7.) "[Plaintiffs] argue that Defendants alleged misrepresentations created an obligation to them to not charge taxes—which is either a contract or tort theory of *damages* for misrepresentation." (*Id.*) (emphasis added). Accordingly, since the UCL only permits claims for restitution, Defendants contend Plaintiffs' fail to state a claim for restitution under the UCL. Restitution, however, may be based on unjust enrichment. Plaintiffs therefore sufficiently allege Defendants were unjustly enriched by improperly shifting sales taxes to consumers.

> Thirty days or more prior to the commencement of an action for damages pursuant to this title, the consumer shall do the following:
>
> (1) Notify the person alleged to have employed or committed methods, acts, or practices declared unlawful by Section 1770 of the particular alleged violations of Section 1770.
>
> (2) Demand that the person correct, repair, replace, or otherwise rectify the goods or services alleged to be in violation of Section 1770.
>
> The notice shall be in writing and shall be sent by certified or registered mail, return receipt requested, to the place where the transaction occurred or to the person's principal place of business within California.

Cal. Civ.Code § 1782(a). Plaintiffs conceded that they failed to comply with the thirty day notice requirement set forth in § 1782, (*see* Plaintiffs' Opposition at 21), and through a separate filing have requested leave of court to "strike the premature allegation of damages without waiver and without prejudice based upon inadvertence and excusable neglect of counsel." (*Id.* at 22.) Thus, the only issue presented is whether the Court should dismiss Plaintiffs' CLRA damages claim with or without prejudice.

Defendants argue, based on *Von Grabe v. Sprint*, 312 F.Supp.2d 1285 (S.D.Cal.2003), that Plaintiffs' failure to provide adequate notice compels dismissal of the CLRA claim for damages with prejudice. Plaintiffs respond, however, by arguing that the facts in this instance are distinguishable from *Von Grabe*, because there has been no attempt to mislead the court by including the claim for damages, as the plaintiff did in *Von Grabe*; rather, the inclusion of

the request for damages was "mistakenly, prematurely included [in] the language requesting damages." (Plaintiffs' Opposition at 22.)

In *Von Grabe*, a cellular phone customer filed claims arising from an equipment replacement program fee charged by a cellular carrier. The plaintiff alleged, among other claims, a claim for damages under the CLRA. Ruling in the context of a motion to dismiss, the court dismissed the plaintiff's CLRA claim with prejudice because he failed to allege proper notice, as required by § 1782(a). In reaching its decision, the court relied on the California Court of Appeal opinion in *Outboard Marine Corp. v. Superior Court*, 52 Cal.App.3d 30, 124 Cal.Rptr. 852 (1975), which held that "*strict* application of the [notice] requirement was necessary" to achieve the goals of the CLRA. The court in *Outboard Marine* noted:

> *The purpose of the notice requirement of section 1782 is to give the manufacturer or vendor sufficient notice of alleged defects to permit appropriate corrections or replacements.* The notice requirement commences the running of certain time constraints upon the manufacturer or vendor within which to comply with the corrective provisions. The clear intent of the act is to provide and facilitate precomplaint settlements of consumer actions wherever possible and to establish a limited period during which such settlement may be accomplished. *This clear purpose may only be accomplished by a literal application of the notice provisions.*

Outboard Marine, 52 Cal.App.3d at 40-41, 124 Cal.Rptr. 852 (emphasis added).

Notably, neither *Outboard Marine* nor *Von Grabe* drew a distinction between inadvertence or willful disregard of the notice requirements. Both courts held that a claim for damages under the CLRA requires *strict* compliance with the notice requirements set forth in § 1782. This Court agrees. Strict adherence to the statute's notice provision is required to accomplish the Act's goals of expeditious remediation before litigation. Because Plaintiffs failed to provide notice to Defendants pursuant to § 1782(a), their claim for damages under the CLRA must be dismissed with prejudice.[6]

This result is not changed by the fact that Plaintiffs also brought a claim under the CLRA for injunctive relief. While § 1782(d) authorizes the filing of an action for injunctive relief *without* first providing notice to the vendor, the statute further directs that such an action may not be converted into an action for damages unless the consumer first complies with the notice provisions of § 1782(a). Accordingly, § 1782 scrupulously prohibits any action for damages unless its notice provisions are met. As stated, the Legislative goals would be eviscerated if consumers were allowed to sue for damages without first providing the statutorily mandated period for remediation.

Plaintiffs' claim for damages is therefore dismissed with prejudice. Plaintiffs' claim for injunctive relief stands, pursuant to § 1782(d).

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[6] This ruling, as with all rulings herein, applies only to the named Plaintiffs.

III.

CONCLUSION AND ORDER

For these reasons, the Court denies Defendants T-Mobile and Cingular's motion to compel arbitration. In addition, the Court grants without prejudice Defendants' collective motion to dismiss Plaintiffs' claims under the UCL and FAL. Plaintiffs shall file a second amended complaint within 20 days of the date this Order is stamped filed addressing the deficiencies noted herein. Finally, Defendants' motion to dismiss Plaintiffs' claims for damages under the CLRA is granted with prejudice.

IT IS SO ORDERED.

APPENDIX C

9 U.S.C. § 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C § 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for

arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

APPENDIX D

T-Mobile Welcome Guide

* * * *

Section 4: Terms and Conditions

* * * *

3. Mandatory Arbitration: Dispute Resolution. YOU WILL FIRST NEGOTIATE WITH US IN GOOD FAITH TO SETTLE ANY CLAIM OR DISPUTE BETWEEN YOU AND US IN ANY WAY RELATED TO OR CONCERNING THE AGREEMENT, OR OUR PROVISION TO YOU OF GOODS, SERVICES, OR UNITS ("CLAIM"). YOU MUST SEND A WRITTEN DESCRIPTION OF YOUR CLAIM TO OUR REGISTERED AGENT (See Sec. 22). IF YOU DO NOT REACH AGREEMENT WITH US WITHIN 30 DAYS, INSTEAD OF SUING IN COURT, YOU AGREE THAT ANY CLAIM MUST BE SUBMITTED TO FINAL, BINDING ARBITRATION WITH THE AMERICAN ARBITRATION ASSOCIATION ("AAA") UNDER ITS PUBLISHED WIRELESS INDUSTRY ARBITRATION RULES, WHICH ARE A PART OF THE AGREEMENT BY THIS REFERENCE AND ARE AVAILABLE BY CALLING THE AAA AT 800-778-7878 OR VISITING ITS WEB SITE AT www.adr.org. You must serve our registered agent (See Sec. 22) with a notice of an arbitration in order to begin an arbitration. This agreement to arbitrate extends to claims that you assert against other parties, including without limit equipment manufacturers and dealers, if you also assert claims against us in the same proceeding. The Agreement involves interstate commerce and despite the choice of law provision in Sec. 25, the Federal Arbitration Act and federal arbitration law govern arbitrations under the Agreement. An arbitrator may only award as much

relief as a court having jurisdiction in the place of arbitration, limited to the same extent that a court would limit such relief and consistent with the provisions of the Agreement. An arbitrator may order injunctive or declaratory relief (so long as that injunctive or declaratory relief does not apply beyond your dealings with us) or summary judgment under applicable law. AAA has a fee schedule for arbitrations. You will pay your share of the arbitrator's fees except: (a) for claims less than $25, we will pay all arbitrator's fees and (b) for claims between $25 and $1000, you will pay $25 for the arbitrator's fee. You and we agree to pay our own other fees, costs and expenses including those for counsel, experts, and witnesses. Visit www.adr.org arbitrator fee information in hardship circumstances.

Neither you nor we may be a representative of other potential claimants or a class of potential claimants in any dispute, nor may two or more individuals' disputes be consolidated in one proceeding. While the prohibition on consolidated or classwide proceedings in this Sec. 3 will continue to apply: (a) you may take claims to small claims court, if they qualify for hearing by such court and (b) if you fail to timely pay amounts due, we may assign your account for collection and the collection agency may pursue such claims in court limited strictly to the collection of the past due debt and any interest or cost of collection permitted by law or the Agreement. YOU AND WE ACKNOWLEDGE AND AGREE THAT THIS SEC. 3 WAIVES ANY RIGHT TO A JURY TRIAL OR PARTICIPATION AS A PLAINTIFF OR AS A CLASS MEMBER IN A CLASS ACTION. IF A COURT OR ARBITRATOR DETERMINES THAT YOUR WAIVER OF YOUR ABILITY TO PURSUE CLASS OR REPRESENTATIVE CLAIMS IS

UNENFORCEABLE, THE ARBITRATION AGREEMENT WILL NOT APPLY AND OUR DISPUTE WILL BE RESOLVED BY A COURT OF APPROPRIATE JURISDICTION, OTHER THAN A SMALL CLAIMS COURT. SHOULD ANY OTHER PROVISION OF THIS ARBITRATION AGREEMENT BE DEEMED UNENFORCEABLE, THAT PROVISION SHALL BE REMOVED, AND THE AGREEMENT SHALL OTHERWISE REMAIN BINDING.

* * * *

[5/04]

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No. 07-976

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

T-MOBILE USA, INC., OMNIPOINT COMMUNICATIONS, INC. D/B/A T-MOBILE, AND TMO CA/NV, LLC,

Petitioners,

v.

JENNIFER LASTER, ANDREW THOMPSON, ELIZABETH VOORHIES, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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April 25, 2008

QUESTION PRESENTED

The Federal Arbitration Act (FAA) provides that arbitration agreements are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Class-action bans—contract provisions that prohibit classwide proceedings, whether in litigation or arbitration—have been held to be unconscionable in some circumstances under the generally applicable contract law of some states. Is such state law preempted by the FAA when the class-action ban to which it is applied is embedded in an arbitration agreement?

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INTRODUCTION

T-Mobile asks this Court to review a question on which the state and federal courts unanimously agree: Whether the Federal Arbitration Act (FAA) categorically preempts any state-law determination that a class-action ban is unconscionable if that ban is embedded in an arbitration clause. Just last month, in *Circuit City Stores, Inc. v. Gentry*, No. 07-998, this Court denied a petition raising the same question, and it should do the same here.

Every state and federal court to confront the question presented has reached the same conclusion—that the FAA, as its plain text indicates, does not preclude courts from assessing on a case-by-case basis and in a manner that does not discriminate against arbitration whether class-action bans are unconscionable under generally applicable state contract law. These courts include the highest courts of California, Illinois, New Jersey, Washington, North Carolina, Alabama, and West Virginia, as well as the Eleventh Circuit (considering Georgia law) and the Ninth Circuit (considering California and Washington law).

Despite that unanimity, T-Mobile tries to create a conflict by exaggerating the significance of speculative closing remarks in a single opinion, *Gay v. Creditinform*, 511 F.3d 369 (3d Cir. 2007), in which FAA preemption was not dispositive. *Gay* held that an unconscionability claim failed as a matter of *Virginia law*, not federal law. To be sure, the opinion went on to discuss how the case *might* be decided *if* Pennsylvania law were applicable, speculating that "we would reach the same result, largely because [of] federal law." *Id.* at 392. But that speculation was specifically limited "to the extent" that Pennsylvania law would, alone among the states, insist

on "the right to bring *judicial* class actions," as opposed to classwide relief in *either* litigation *or* arbitration. *Id.* at 394. Such a state-law rule differs markedly from the law of other states and would likely be preempted because, unlike the California law applied in this case, it would flatly discriminate against arbitration—and class arbitration in particular.

Thus, *Gay* does not create a conflict on a question of federal law but, at best, merely identifies a potential difference in *state law* that might lead to different consequences for FAA preemption—as the Ninth Circuit recently recognized when it distinguished *Gay* on that basis in *Lowden v. T-Mobile USA, Inc.*, 512 F.3d 1213, 1221 n.3 (9th Cir. 2008). And even that state-law difference is more imagined than real, because Pennsylvania's highest court has yet to decide the state-law question and has abrogated the lower-court decisions on which *Gay* relied.

Finally, T-Mobile stretches to create a broader conflict over the enforceability of class-action bans, but the cases it cites do not even reach the FAA preemption issue presented in this case. Most of these cases decide whether class-action bans conflict with specific federal remedial statutes, while others determine whether particular class-action bans violate the unconscionability doctrines of specific states. Differing outcomes concerning the enforceability of class-action bans are not a reflection of any conflict over FAA preemption, but are instead the inevitable consequence of an analysis that is fact- and context-specific and that turns (as AT&T's *amicus* brief point out) on the evolving design of the contracts themselves.

Given the absence of any conflict on the question presented—and given the serious danger that review at

this time would unnecessarily inhibit the evolution of arbitration agreements in the marketplace, the law governing their enforceability, and the development of efficient classwide arbitration procedures—the petition should be denied.

STATEMENT

A. Class Arbitration and Class-Action Bans

Despite its potential to combine the efficiencies of both arbitration and the class-action device, American courts have until recently demonstrated a hostility to classwide arbitration. That hostility is "a remnant of the historic mistrust of the arbitral process" that the FAA was intended to eradicate. Buckner, *Toward a Pure Arbitral Paradigm of Classwide Arbitration: Arbitral Power and Federal Preemption*, 82 Denv. U.L. Rev. 301, 301 (2004); *see also Discover Bank v. Superior Court*, 113 P.3d 1110, 1113 (Cal. 2005) (view that "arbitration is an inferior forum and therefore cannot be trusted with classwide claims" reflects "the very mistrust of arbitration that has been repudiated by the United States Supreme Court" and the FAA). Despite its invocation of the FAA, T-Mobile's position bristles with that same hostility. Indeed, the court below would have sent this case to arbitration had T-Mobile's form contract not insisted on a judicial forum in the event its class-ban was held unenforceable. Pet. App. 37a-37a.

An important turning point in the evolution of classwide arbitration came in *Green Tree Financial Corporation v. Bazzle*, 539 U.S. 444 (2003), when a majority of this Court rejected the argument that class actions are incompatible with arbitration. Following *Bazzle*, major arbitration organizations in the United States, such as the American Arbitration Association, adopted classwide arbitration rules, and hundreds of

class arbitrations began to appear on their dockets. *See* Buckner, *supra*, at 333-34. Some businesses, like T-Mobile, however, responded by attempting to insulate themselves from *any* type of classwide proceeding by embedding class-action bans in their arbitration agreements.

Class-action bans are contract provisions that strip consumers or employees of the right to seek any classwide relief (whether through class-action litigation or classwide arbitration). Under the general contract law of many states, such provisions may be unconscionable where the inability to seek any form of classwide relief effectively exculpates the drafter from potential liability for individually small claims involving widespread practices. State law in this regard arises from generally applicable rules relating to all sorts of exculpatory contract terms, and applies equally to bans of class-action litigation in contracts without arbitration clauses as it does to bans of class arbitration in contracts with such clauses.

Under the FAA, arbitration agreements are valid and enforceable "save upon such grounds as exist at law or in equity for the revocation of *any* contract." 9 U.S.C. § 2 (emphasis added). This Court has consistently interpreted that savings clause to mean that "generally applicable contract defenses such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2" of the FAA. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). The sole question presented by T-Mobile's petition is whether the FAA preempts a state-law determination that a particular class-action ban is unconscionable, where that ban happens to be found in an arbitration clause.

B. Factual and Procedural Background

Elizabeth Voorhies and Jennifer Laster are Californians who purchased wireless phones and service plans from Cingular (now AT&T) and T-Mobile, respectively. AT&T is the largest wireless telephone company in the United States; T-Mobile is the fourth largest. Voorhies and Laster brought a putative class action against both companies, alleging that they violated state consumer-protection law by charging sales tax on the full retail value of the phones, which were advertised as "free" or substantially discounted. Both companies separately moved to compel arbitration. Invoking class-action bans embedded in arbitration agreements, the companies insisted on individual rather than classwide arbitration.

At the time Laster received her phone from T-Mobile, she signed a one-page Service Agreement, which identified her plan rates and the equipment she purchased but mentioned neither mandatory arbitration nor a class-action ban. Pet. App. 8a-9a. Inside the sealed box containing her phone was a copy of T-Mobile's fifty-two page "Welcome Guide." *Id.* 9a. Within that Welcome Guide, along with general information about the phone itself, was a mandatory binding arbitration clause that purported to prohibit any consumer from representing "other potential claimants or a class of potential claimants in any dispute" with T-Mobile. *Id.* 37a. The clause also included a provision stating that in the event the class-action ban was unenforceable, the arbitration agreement would not apply, and any dispute would be resolved in a court. *Id.* When she bought her phone from AT&T, Voorhies was likewise given an arbitration agreement containing a class-action ban. *Id.* 6a-8a.

The district court, relying on the California Supreme Court's decision in *Discover Bank*, 113 P.3d 1110, concluded that the class-action bans in both companies' agreements were unconscionable under California law because, among other things, they were contained in contracts of adhesion and would exculpate the companies from a claim that the party with superior bargaining power had carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money. Pet App. 20a. Adhering to the position of all other courts to decide the question, the district court also held that this state-law ruling did not discriminate against arbitration, and hence was not preempted by the FAA, because it was based on general contract-law principles that applied equally to contracts with or without arbitration agreements. *Id.* 24a.

Both AT&T and T-Mobile appealed. While the case was pending, the court of appeals issued its decision in *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976 (9th Cir. 2007), which held that California law holding some class-action bans unconscionable, as articulated in *Discover Bank*, was not preempted by the FAA. In this case, the court of appeals affirmed in an unpublished memorandum, holding that *Shroyer* had already "expressly and conclusively" rejected the argument that the application of California's unconscionability law to class-action bans in arbitration clauses is preempted by the FAA. *Id.* 1a-2a.

AT&T dropped its appeal after the decision in *Shroyer* was issued and did not petition for certiorari. Indeed, before this Court, AT&T has filed an *amicus* brief recommending that the Court deny the petition, arguing that review based on the outdated, "second generation" agreement at issue in this case would not

only be premature and unnecessary in light of the absence of any conflict, but would affirmatively interfere with the ongoing evolution of class-action bans in arbitration agreements, and the state law concerning their enforceability. That evolution, AT&T argues, has already produced "third generation" agreements more protective of consumer rights than the arbitration clause at issue here, and may ultimately result in agreements that pass muster under state law, thus obviating any perceived need for review of the federal question presented.

REASONS FOR DENYING THE WRIT

T-Mobile repeatedly describes this case as presenting the question whether courts may refuse to enforce arbitration agreements on the grounds that "individual arbitration" is unconscionable. By framing the issue in this way, T-Mobile attempts to obscure the fact that it is *its* position, not respondents', that is hostile to arbitration, and to class arbitration in particular. T-Mobile already has the right to compel arbitration. What it seeks is the ability to use a class-action ban that it placed within an arbitration clause to exculpate itself from any liability for small consumer claims, by precluding classwide proceedings of any kind, in any forum, including an *arbitral* forum.

The court below did not hold that the class-action ban in this case was unconscionable because it happened to be contained within an agreement to arbitrate. To the contrary, it held, as a matter of *state law*, and based on the circumstances of this case—a case involving very small individual claims spread across a large class of people—that an adhesion contract provision denying the opportunity for classwide relief (whether in litigation or in arbitration) is an unenforceable exculpatory provision.

Because that conclusion is based on generally applicable contract law that applies equally to contracts with or without arbitration clauses, it is not preempted by the FAA merely because the provision in question happens to be found in an arbitration agreement. Indeed, no federal appellate court or state court of last resort has held that such an even-handed application of state unconscionability doctrine is preempted by federal law. In the absence of such a conflict, T-Mobile offers no persuasive reason for this Court to review an unpublished opinion presenting precisely the same question on which it has recently declined review

I. THERE IS NO CONFLICT OVER THE QUESTION PRESENTED.

A. Every Court That Has Decided the Question Presented Has Reached the Same Conclusion.

There is no conflict among the courts over the question presented. Every state court of last resort and every federal circuit to have decided the question has reached the same conclusion: The FAA does not preclude courts from assessing whether particular class-action bans are unconscionable under generally applicable state contract law.

To date, seven state courts of last resort have issued decisions on the question presented. Five state high courts—California, Illinois, New Jersey, Washington, and North Carolina—have recently held that the FAA does not preempt state-law determinations, under generally applicable contract law, that particular class-action bans may be unconscionable. *See Discover Bank*, 113 P.3d at 1110-17; *Muhammad v. County Bank of Rehoboth, Del.*, 912 A.2d 88, 94-96 (N.J. 2006), *cert. denied*, 127 S. Ct. 2032 (2007); *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250, 260-63 (Ill. 2006); *Scott v.*

Cingular Wireless, 161 P.3d 1000, 1008-09 (Wash. 2007); *Tillman v. Commercial Credit Loans, Inc.*, 655 S.E.2d 362, 373 (N.C. 2008). These recent decisions are consistent with two pre-*Bazzle* rulings by the supreme courts of Alabama and West Virginia.[1] In addition, lower state courts in Missouri, Florida, Wisconsin, and Oregon have reached the same conclusion.[2]

The federal circuits that have decided the FAA preemption question have come to the same conclusion. The Eleventh Circuit and the Ninth Circuit have both recently issued decisions finding particular class-action bans unconscionable under state law and rejecting claims of FAA preemption. *See Dale v. Comcast Corp.*, 498 F.3d 1216, 1219 (11th Cir. 2007) (Georgia law); *Shroyer v. New Cingular Wireless Services, Inc.*, 498 F.3d 976, 987-93 (9th Cir. 2007) (California law); *Lowden v. T-Mobile USA*, 512 F.3d 1213, 1219-22 (9th Cir. 2008) (Washington law). These holdings are consistent with earlier Ninth Circuit precedent predicting California law prior to

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[1] *Leonard v. Terminix Int'l Co., L.P.*, 854 So. 2d 529, 535-36 (Ala. 2002) (FAA does not preempt challenge to class-action ban on state-law unconscionability grounds; such a challenge does not discriminate against arbitration because the analysis "would be the same if the contract merely prohibited assertion of claims on a class-wide basis" in litigation); *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265, 272 n.3 (W. Va.), *cert. denied*, 537 U.S. 1087 (2002) (FAA does not bar application of generally applicable contract defense of unconscionability to strike class-action ban).

[2] *Vasquez-Lopez v. Beneficial Oregon, Inc.*, 152 P.3d 940, 944 (Or. App. 2007); *Coady v. Cross Country Bank*, 729 N.W.2d 732, 748 (Wis. App.), *review denied*, 737 N.W.2d 432 (Wis. 2007); *Reuter v. Davis*, 2006 WL 3743016, at *2 (Fla. Cir. Ct. Dec. 12, 2006); *Whitney v. Alltel Communications, Inc.*, 173 S.W.3d 300, 308, 310 (Mo. App. 2005).

Discover Bank.[3] Several federal district courts in various states have similarly held that the FAA does not stand as a barrier to a determination that class-action bans are unenforceable under generally applicable state-law unconscionability doctrine.[4]

B. The Third Circuit's Opinion in *Gay* Does Not Create a Conflict.

Against the unanimous position of the courts that have actually decided the question presented, T-Mobile pits the closing remarks in a single recent opinion in which FAA preemption was not even a dispositive issue. According to T-Mobile, the Third Circuit, in *Gay v. Creditinform*, 511 F.3d 369 (3d Cir. 2007), dramatically broke ranks with all other courts and "ruled" that the FAA categorically "precludes a court from refusing to enforce an agreement to arbitrate individually based upon a state-law determination that individual arbitration of small consumer claims is unconscionable." Pet. 2.

That description does not reflect the holding of the Third Circuit—or, for that matter, the holding of any court anywhere. In fact, *Gay* disposed of the plaintiff's unconscionability challenge on the basis of *Virginia law*, not FAA preemption. The agreement at issue contained a Virginia choice-of-law clause, and the court was fully "satisfied that there [was] no reason not to honor the

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[3] *Ting v. AT&T*, 319 F.3d 1126, 1150 (9th Cir.), *cert. denied*, 540 U.S. 811 (2003).

[4] *See, e.g., Creighton v. Blockbuster, Inc.*, 2007 WL 1560626 (D. Or. 2007); *Wong v. T-Mobile USA, Inc.*, 2006 WL 2042512 (E.D. Mich. 2006); *Hollins v. Debt Relief of America*, 479 F. Supp. 2d 1099 (D. Neb. 2007); *Doerhoff v. General Growth Props., Inc.*, 2006 WL 3210502 (W.D. Mo. 2006).

parties' choice of Virginia law in considering the unconscionability claim." 511 F.3d at 390 ("[W]e will apply Virginia law in considering the enforceability of the arbitration provision."). Applying the standards set by the Virginia Supreme Court, the court held that the agreement was not unconscionable *as a matter of state law*. *Id.* at 391-92 (citing *Mgmt. Enters., Inc. v. Thorncroft Co.*, 416 S.E.2d 229, 231 (Va. 1992)). In reaching this conclusion, *Gay* reiterated the rule that generally applicable state law controls the unconscionability analysis. *Id.* at 388 ("federal courts may apply state law pursuant to section two of the FAA" and "[i]n particular, generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2").

To be sure, although the *Gay* opinion "recognized that courts including our court" must look to the applicable state's law, it also noted that "one might wonder why the consideration of state law is so confined" because "it is logical that the law should be uniform throughout the country." *Id.* at 388 n.13. But the court made clear that its decision on Virginia-law grounds made a definitive resolution of such concerns unnecessary: "[I]f a further examination of that point ever is needed it will be at some later day as we have no need to consider it now. The need to examine the question might arise" if the relevant state law were "aberrational." *Id.*

In the same hypothetical vein, the opinion went on to discuss how the panel might have decided the case if there were no choice-of-law clause, so that the law of the Pennsylvania forum applied instead. In that scenario, it speculated that "we would reach the same result, largely because federal law requires that we do so and

Pennsylvania law must conform with federal law." *Id.* at 392. This discussion of Pennsylvania law was doubly hypothetical, as it was premised not on an authoritative construction of state law, but on a pair of lower-court decisions—*Lytle v. CitiFinancial Services, Inc.*, 810 A.2d 643 (Pa. Super. Ct. 2002), and *Thibodeau v. Comcast Corp.*, 912 A.2d 874 (Pa. Super. Ct. 2006)—that have themselves been abrogated by the Pennsylvania Supreme Court as reflecting an improper presumption in favor of unconscionability.[5]

Based only on those two now-discredited cases, *Gay* assumed for purposes of its discussion that the Pennsylvania Supreme Court—unlike the high courts of, for example, California, Illinois or Washington—would demand hostility to arbitration, requiring that consumers be permitted to bring classwide proceedings *in court* as opposed to in arbitration. The court specifically limited its speculation about FAA preemption to this understanding of state law: The FAA would preempt state law only "[t]o the extent . . . that *Lytle* and *Thibodeau* hold that the inclusion of a waiver of the right to bring *judicial* class actions in an arbitration

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[5] *See Salley v. Option One Mortgage Corp.*, 925 A.2d 115, 129 (Pa. 2007) (concluding that *Lytle* "swept too broadly" and reflected an improper presumption in favor of unconscionability); *see also* Kaplinsky, *Scorecard on Class-Action Waivers*, 1657 PLI/Corp 127, 154 n.5 (2008) (citing *Lytle* and *Thibodeau* and stating that *Salley* "casts serious doubt on the continued vitality of these two opinions"). Just last week, the Third Circuit, assessing an arbitration agreement under Pennsylvania law, recognized that the Pennsylvania Supreme Court had "expressly abrogat[ed]" *Lytle*. *Zimmer v. Cooperneff Advisors, Inc.*, --- F.3d ---, 2008 WL 1700526, at *6 (3d Cir. Apr. 14, 2008) (describing *Lytle*'s analysis as "discredited" and reliance on the decision by federal courts as "questionable").

agreement" is unconscionable. *Id.* at 394 (emphasis added); *see also id.* at 395 (describing plaintiff's argument "that the provision is unconscionable because of what it provides—*i.e.* arbitration of disputes on an individual basis *in place of litigation* possibly brought on a class action basis") (emphasis added).[6]

To the extent that *Gay*'s assumptions about Pennsylvania law were correct, its hypothetical preemption analysis, too, was likely correct because the FAA "withdrew the power of the states to *require a judicial forum* for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) (emphasis added). *Gay*'s speculation about the potential FAA preemption of Pennsylvania law was based, however, on an understanding of Pennsylvania law that differs markedly from the law of states like California, Illinois, or New Jersey. *Compare Gay*, 511 F.3d at 394, *with Muhammad*, 189 N.J. at 101 (under New Jersey law, it is unconscionable in some circumstances to deprive consumers of "the mechanism of a class action, *whether in arbitration or in court litigation*") (emphasis added); *Discover Bank*, 113 P.3d at 1112 ("In the present case, the principle that class-action waivers are, under certain circumstances,

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[6] The unusual way in which the issue was framed in *Gay* may also be a function of the fact that the unconscionability challenge was not the chief issue on appeal. Rather, the plaintiff, who had sued under the federal Credit Repair Organizations Act (CROA) and a parallel state statute, contended that both statutes gave her "a right to assert her claims in a *judicial forum*" and expressly prohibited a waiver of that right. 511 F.3d at 375 (emphasis added); *see* 15 U.S.C. § 1679f(a) (prohibiting "[a]ny waiver by any consumer of . . . any right of the consumer" under the CROA); *id.* § 1679f(c) (providing that consumers "have a right to sue" under the CROA).

unconscionable as unlawfully exculpatory is a principle of California law that does not specifically apply to arbitration agreements, but to contracts generally. In other words, it applies equally to class action litigation waivers in contracts without arbitration agreements as it does to class arbitration waivers in contracts with such agreements."). Thus, the "conflict" claimed by T-Mobile arises not from conflicting approaches to the *federal-law* question presented, but rather on underlying differences in *state law* and, in particular, *Gay*'s understanding of a hypothetical and unique rule of state law that would impermissibly discriminate against arbitration.

In four different instances, T-Mobile quotes the Ninth Circuit's recent statement declining to "follow" *Gay* in *Lowden v. T-Mobile USA, Inc.*, 512 F.3d 1213, 1221 n.3 (9th Cir. 2008). *See* Pet. 2, 12, 17 n.1, 24. But T-Mobile misleadingly omits the explanation for that statement, which is given in the very next sentence. *Lowden* did not *disagree* with *Gay*'s FAA preemption discussion. Rather, it *distinguished* that discussion on the grounds that the applicable Washington *state law* in *Lowden* was entirely unlike the hypothetical *state law* discussed in *Gay*. As *Lowden* explained, "[u]nlike" the Pennsylvania law described in *Gay*, "the Washington Supreme Court in *Scott* does not hold 'that an agreement to arbitrate may be unconscionable simply because it is an agreement to arbitrate.'" *Id.; see also id.* at 1221 ("[T]he *Scott* holding targets not the arbitration context, but rather the class action waiver, which the Washington State Supreme Court has determined would deprive Washington consumers of a right generally applicable to arbitration and litigation contracts alike and which only happens to be within an arbitration agreement in this case."). This Court does not sit to resolve such differences in state law.

T-Mobile's claim of a conflict thus ignores the critical differences for federal preemption analysis that may flow from differences in state law. Indeed, T-Mobile's reliance on *Gay* as the basis for a claim of conflict is particularly mistaken because "the state's highest court has not spoken" on the state-law issue. Gressman, *et al.*, *Supreme Court Practice* § 4.10, at 261 (9th ed. 2007). Whether, and under what circumstances, class-action bans are unconscionable under Pennsylvania contract law is "a matter that ultimately rests with the highest state court and that can be authoritatively clarified by the highest state court in future litigation." *Id.* Pennsylvania's highest court has yet to decide that question, and it is quite possible, even likely, that a decision by that court would differ from *Gay*'s reading of state law and wipe out the tenuous "conflict" claimed by T-Mobile. The Third Circuit, moreover, has yet to discuss the FAA preemption question presented here in any case in which it actually affects the outcome. When the question arises in a Third Circuit case in which Pennsylvania provides the applicable law (unlike in *Gay*), the Third Circuit would likely certify the state-law question to the state court, as it has done recently on other state-law unconscionability questions. Or the issue might arise first in an appeal that comes up through the state courts. Until then, in the absence of a decision on the predicate state-law issue by the state's highest court, or even a Third Circuit case in which the outcome actually turns on the federal preemption question, the Third Circuit's speculation about Pennsylvania law and FAA preemption will remain purely academic.[7]

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[7] Currently pending before the Third Circuit is an appeal squarely raising the question whether New Jersey law concerning

(*Footnote continued*)

That *Gay* does not reflect the categorical rejection of the application of all state unconscionability doctrines to class-action bans in arbitration agreements is confirmed by the fact that the Third Circuit's approach—before *Gay*, in *Gay* itself, and after *Gay*—has been to regard the unconscionability of a contract provision, including a class-action ban, as a matter of general state contract law. In *Delta Funding v. Harris*, 426 F.3d 671, 671 (3d Cir. 2005), for example, the Third Circuit certified to the New Jersey Supreme Court the "undecided issue of New Jersey law" whether a class-action ban contained in an arbitration clause was unconscionable under the circumstances.[8] And after *Gay*, the Third Circuit has continued to analyze unconscionability as a matter of state law just as it did before. *See Zimmer v. Cooperneff Advisors, Inc.*, --- F.3d ---, 2008 WL 1700526 (3d Cir. Apr. 14, 2008) (analyzing unconscionability of arbitration clause under Pennsylvania law, without citing *Gay*); *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Clemente*, 2008 WL 857756 (3d Cir. Mar. 31, 2008) (same as to New Jersey law).

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the unconscionability of class-action waivers is preempted by the FAA. *Homa v. American Express Co.*, 3d Cir. Case No. 07-2921. Unlike *Gay*, *Homa* presents the question in a case in which it may affect the outcome, and where the court has the benefit of a decision by the state's highest court. New Jersey's high court has squarely confronted the question of whether, and under what circumstances, a class-action waiver may be unconscionable. *See Muhammad*, 912 A.2d at 97.

[8] As the Third Circuit later explained when it received the New Jersey court's ruling in *Delta Funding*, the point of such certifications is that they allow "federal courts to give the state supreme courts an opportunity to elucidate an important issue of state law, thereby avoiding erroneous predictions that will confuse rather than clarify the issue." *Delta Funding v. Harris*, 466 F.3d 273, 273 n.1 (3d Cir. 2006) (emphasis added).

If the Third Circuit actually followed the rule that T-Mobile attributes to the Third Circuit—a rule that categorically precludes *any* decision that a class-action ban in an arbitration clause is unenforceable based on a state-law determination of unconscionability—it would have been pointless to have certified the class-action ban issue to the New Jersey court in *Delta Funding* or to analyze Virginia law in *Gay*, because the FAA would have preempted a finding of unconscionability in any event. *See Kinkel*, 857 N.E.2d at 260 ("If plaintiff's claim is preempted by federal law, we need go no further in our analysis of the class action waiver."); *Muhammad*, 912 A.2d at 96 ("Because federal arbitration law does not prevent us from examining the validity of the class-arbitration waiver, we turn then to our state law requirements in respect of contract unconscionability.").

* * *

Given all of the above—the Third Circuit's consistent treatment of the unconscionability issue as one of state law in cases such as *Delta Funding*; the hypothetical nature of *Gay*'s discussion of Pennsylvania law; *Gay*'s assumption that Pennsylvania law would, alone among the states, insist on a "judicial class action"; the abrogation of the lower-court decisions on which that assumption was based; and *Lowden*'s distinction between Washington law and Pennsylvania law as depicted in *Gay*—the petition's claim that *Gay* creates a conflict on the question presented is wrong.

C. There Is No Broader Conflict of Federal Law Concerning the Enforceability of Class-Action Bans.

Absent any cases adopting its theory that the FAA categorically precludes courts from holding class-action bans in arbitration agreements unconscionable, T-Mobile

looks even further afield in an attempt to create a conflict. The petition (at 3, 21-22) cobbles together two distinct categories of cases from the Third, Fourth, Seventh, and Eleventh Circuits in which those courts enforced class-action bans, suggesting a broader conflict over the enforceability of such provisions. What T-Mobile fails to mention is that not one of those cases actually decided the FAA preemption question presented by the petition.

Four of the cases that T-Mobile cites, all of them pre-*Bazzle*, did not involve state-law unconscionability challenges at all, let alone the issue of federal preemption under the FAA. Instead, they decided the very different question of whether a class-action ban may in some circumstances conflict with the policies of a particular federal remedial statute. *See Livingston v. Assocs. Fin. Inc.*, 339 F.3d 553 (7th Cir. 2003) (Truth in Lending Act); *Snowden v. Checkpoint Cashing*, 290 F.3d 631 (4th Cir. 2002) (Truth in Lending Act and RICO); *Randolph v. Green Tree Fin. Corp.*, 244 F.3d 814 (11th Cir. 2001) (Truth in Lending Act); *Johnson v. West Suburban Bank*, 225 F.3d 366 (3d Cir. 2000) (Truth in Lending Act). More recently, the First Circuit held that a class-action ban was unenforceable because it interfered with the plaintiffs' ability to vindicate their rights under the Clayton Antitrust Act, but the court was careful to emphasize the differences between the Antitrust Act and the Truth-in-Lending context in which the earlier cases arose. *See Kristian v. Comcast Corp.*, 446 F.3d 25, 55-61 (1st Cir. 2006). No direct conflict has yet emerged among these vindication-of-federal-rights cases. In any event, even if a conflict were to emerge within this line of cases, it would not implicate the question presented in *this* case, which is whether federal

law precludes a *state-law* unconscionability challenge in a case involving only state-law claims.

That leaves one last case cited by the petition as evidence of a conflict: *Jenkins v. First Am. Cash Advance of Ga.*, 400 F.3d 868 (11th Cir. 2005). *Jenkins*, like this case, *did* involve a state-law unconscionability challenge to a class-action ban in an arbitration clause. But far from adopting T-Mobile's preemption theory, *Jenkins* recognized that "[t]he FAA allows state law to invalidate an arbitration agreement, provided the law at issue governs contracts generally and not arbitration agreements specifically." *Id.* at. 875. Applying Georgia law, *Jenkins* concluded that there was no substantive unconscionability in that case, particularly given the ability of the plaintiffs to recover attorneys' fees. *Id.* at 877-78.

T-Mobile's use of *Jenkins* to suggest that the law of the Eleventh Circuit somehow conflicts with the decision below is particularly misleading because the petition omits a more recent Eleventh Circuit decision, authored by the same judge, that squarely decided the question presented. In *Dale*, 498 F.3d 1219, the Eleventh Circuit held that the FAA did *not* preclude the court from finding a class-action ban unconscionable under Georgia law where the class-action ban happened to be found in an arbitration agreement. *Dale*'s unconscionability holding was based in part on the extremely limited opportunity of the cable television subscribers in that case to recover attorneys' fees, making it "difficult for a single subscriber to obtain representation" and "allow[ing] Comcast to engage in unchecked market behavior that may be unlawful." *Id.* at 1224.

At bottom, what the petition seeks to do is to transform differing outcomes—based on differing facts,

differing contracts, and differing federal statutes or state contract law—into a conflict of law. But no jurisdiction has adopted a categorical rule negating *all* class-action bans. The analysis is sensitive to the context, the facts, and the differences in unconscionability doctrine among the state courts. Outcomes necessarily differ. *See Muhammad*, 912 A.2d at 24 (striking down class-action ban based on a "fact-sensitive" assessment of unconscionability); *Delta Funding v. Harris*, 912 A.2d 104, 115 (N.J. 2006) (in a decision issued the same day as *Muhammad*, upholding a class-action ban in a case involving large damages and explaining that "a class-arbitration waiver in [an] arbitration agreement is not unconscionable per se").

As AT&T points out in its *amicus* brief, the differing outcomes also turn on the way the arbitration clauses are designed. In *Jenkins* and *Dale*, for example, the outcome of the state-law analysis turned in part on the extent to which plaintiffs could recover attorneys' fees so that they would have a meaningful ability to pursue individual relief. Although T-Mobile suggested otherwise in the court below, it is doubtful that the T-Mobile arbitration agreement provides for the recovery of attorneys' fees where available under the applicable substantive law—a fact that may make this case a particularly poor vehicle to explore the question presented. *See* Br. of *Amicus* AT&T 19-21. The fact that the T-Mobile agreement represents an older generation of agreements, and that a new generation of agreements, touted by their drafters as more "consumer friendly," has emerged, provides an additional reason for refraining from deciding the question presented in the context of this case. Review at this time would not resolve any conflict among the courts—because there is none—but would risk hindering the natural evolution of both arbitration clauses and

class arbitration procedures. *See Muhammad*, 912 A.2d at 24 ("Class arbitration is in its infancy and may provide a fertile ground for establishing flexible class-action procedures.").

II. T-MOBILE'S CLAIM OF A CONFLICT WITH THIS COURT'S PRECEDENT RESTATES ITS MISGUIDED PREEMPTION THEORY, WHICH HAS NOT BEEN ADOPTED BY ANY COURT.

In closing, T-Mobile asserts that the decision below "conflicts with this Court's cases on the fundamental relationship between the FAA and state-law substantive and procedural policies." Pet. 25. That assertion, however, merely restates T-Mobile's theory on the merits of the preemption issue—a theory that has thus far attracted no takers.

Indeed, T-Mobile's categorical preemption theory has been carefully considered and uniformly rejected by the state and federal appellate courts in cases such as *Shroyer*, 498 F.3d at 987-93; *Discover Bank*, 113 P.3d at 1110-17; *Scott*, 161 P.3d at 1008-09; *Kinkel*, 857 N.E.2d at 260-63; and *Muhammad*, 912 A.2d at 94-96. These decisions address this Court's cases on FAA preemption (the same cases cited at pages 26-29 of the petition), the FAA's policy of ensuring that arbitration agreements stand on an equal footing with all other contracts, general principles of express and implied federal preemption, and the generally applicable nature of the state-law doctrine alleged to be preempted. Neither T-Mobile's dissatisfaction with the consensus view of the state and federal courts, nor its ability to invoke snippets of this Court's cases to support its argument, amount to a conflict warranting

certiorari. *See* Gressman, *Supreme Court Practice* § 4.5 at 250 (noting that lawyers "are likely to regard any case they have lost in a lower court as necessarily in conflict with some Supreme Court decision or doctrine" and that a "conflict must truly be direct" and "readily apparent" to justify certiorari).

As T-Mobile acknowledges, the plain text of the FAA makes arbitration agreements enforceable "save upon such grounds as exist in law or in equity for the revocation of *any* contract." 9 U.S.C. § 2 (emphasis added). This Court's cases have consistently explained that the FAA requires that arbitration clauses be placed on an *equal* footing with all other contracts: "States may regulate contracts, including arbitration clauses, under general contract law principles" but they may not discriminate against arbitration clauses. *Casarotto*, 517 U.S. at 686. "[S]tate law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." *Perry v. Thomas*, 482 U.S. 483, 491, 492 n.9 (1987) (emphasis in original). However, a "state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport" with the FAA. *Id.*

The courts that have decided the question presented have adhered scrupulously to these principles. *See Shroyer*, 498 F.3d at 990 ("The California Supreme Court in *Discover Bank* placed arbitration agreements with class action waivers on the *exact same footing* as contracts that bar class action litigation outside the context of arbitration.") (emphasis in original). As the Washington Supreme Court explained in *Scott*, the FAA "requires us to put arbitration clauses on the *same* footing as other contracts, not make them the special

favorites of the law." 161 P.3d at 1008 (emphasis in original). Because the law of states such as Washington, California, Illinois, and New Jersey with respect to exculpatory clauses applies regardless of whether a class-action ban is found in an arbitration agreement or some other contract, it does not run afoul of the FAA: "The arbitration clause is irrelevant to the unconscionability." *Id.* Exculpatory clauses "do not change their character merely because they are found within a clause labeled 'Arbitration'." *Id.* Indeed, on the same day that it issued its opinion in *Scott*, the Washington Supreme Court, in another case, held unenforceable a forum selection clause in a non-arbitration agreement that had the effect of barring class actions. *Dix v. ICT Group, Inc.*, 161 P.3d 1016 (Wash. 2007).

Moreover, decisions such as *Discover Bank*, *Scott*, and *Shroyer* do not hold that arbitration itself is foreclosed unless the class-action ban is inseverable from the arbitration agreement. Thus, they are neutral as to whether classwide proceedings take place in arbitration or in court—the answer depends on the parties' agreement. In this case, proceeding via litigation rather than arbitration was *T-Mobile's own choice*. T-Mobile, not California law, determined that if it could not enforce its class-action ban, it would prefer to proceed in court.

In short, T-Mobile's categorical preemption theory—under which the FAA would preclude *any* state-law determination that a class-action ban is unconscionable if the class-action ban is contained in an arbitration clause—is unprecedented. No court has adopted that position, and nothing in this Court's jurisprudence requires such a sweeping displacement of generally applicable state contract law.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

T-MOBILE USA, INC., OMNIPOINT COMMUNICATIONS, INC. D/B/A T-MOBILE, AND TMO CA/NV, LLC,
Petitioners,

v.

JENNIFER L. LASTER, ANDREW THOMPSON, ELIZABETH VOORHIES, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED AND ON BEHALF OF THE GENERAL PUBLIC,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

In their Petition, T-Mobile USA, Inc., OmniPoint Communications, Inc. d/b/a T-Mobile, and TMO CA/NV, LLC (collectively, "T-Mobile") showed that the Ninth Circuit's refusal to enforce individual arbitration in accordance with the terms of the parties' agreement conflicts with the Third Circuit's decision in *Gay* v. *CreditInform*, 511 F.3d 369 (3d Cir. 2007), is inconsistent with the decisions of three additional federal circuits, and cannot be reconciled with this Court's decisions applying the Federal Arbitration Act ("FAA"). Pet. 2-3, 14-22, 25-29. T-Mobile further showed that this issue is one of recurring importance that affects contracts that benefit countless consumers and businesses nationwide. *Id.* at 4, 13-14, 22-25.

Respondents do not dispute the vital importance of the issue presented. Rather, they argue, erroneously, that "[t]here is no conflict" over the question presented because the FAA preemption ruling by the Third Circuit in *Gay* "does not reflect the holding of . . . any court anywhere." Opp. 8, 10. As shown below, the FAA ruling in *Gay* unquestionably was a holding of that court, which is binding precedent in the Third Circuit, see, *e.g.*, *Mariana* v. *Fisher*, 338 F.3d 189, 201 (3d Cir. 2003); *In re Hammond*, 27 F.3d 52, 57 (3d Cir. 1994), and which conflicts directly with the decision of the Ninth Circuit below, Pet. App. 2a-3a. Moreover, the decision below implicates a broader conflict with four courts of appeals that have ruled that the FAA mandates enforcement of individual arbitration because it provides for the effective vindication of rights by consumers. Pet. 20-

22 (citing decisions of the Third, Fourth, Seventh, and Eleventh Circuits).

Nor do respondents' arguments on the merits provide a basis for denying review. Opp. 21-23. Under the FAA, agreements to arbitrate are enforceable as a matter of federal law save for "grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (emphasis added). The *Shroyer/Discover Bank* standard adopted by the court below applies only to a subset of "consumer contract[s]" and thus is not a basis for refusing enforcement of "any contract." Contrary to respondents' core argument, courts may not refuse to enforce arbitration procedures merely because they do not mirror those already available in court litigation. See *Perry* v. *Thomas*, 482 U.S. 483, 492 n.9 (1987). Indeed, respondents' position undermines the principal benefit of arbitration – providing parties an alternative to the costs and delay associated with litigation. See *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985).

T-Mobile's arbitration agreement provides for an informal, streamlined and effective method of individual dispute resolution that allows respondents to vindicate their substantive rights by obtaining the same recovery on their individual claims that would be available in court. Both T-Mobile and respondents benefit from this method of dispute resolution. As explained in *Perry*, 482 U.S. at 492 n.9, and by the Third Circuit in *Gay*, 511 F.3d at 395, under the FAA, courts may not refuse to enforce the parties' agreement to arbitrate individually by "hold[ing] that an agreement to arbitrate may be unconscionable simply because it is an agreement to arbitrate." *Id.*

In sum, the petition should be granted.

A. This Case Implicates A Square Conflict Over The Enforceability Of Individual Arbitration Under The FAA.

Respondents' lead argument is that there is no conflict among the lower courts because the FAA ruling in *Gay* does not "reflect the holding of the Third Circuit" and that its reasoned analysis of the FAA instead should be dismissed as mere "speculative closing remarks." Opp. 1, 10. That argument should be rejected.[1]

In *Gay*, the Third Circuit carefully considered and rejected plaintiff's argument that, under Pennsylvania law, the parties' agreement to arbitrate individually was unenforceable because it was unconscionable. 511 F.3d at 392-95. After ruling that individual arbitration was enforceable under Virginia law, the *Gay* court addressed plaintiff's argument that the arbitration clause was unconscionable under Pennsylvania law. *Id.* Applying this Court's decision in *Perry*, 482 U.S. at 491, the Third Circuit ruled that the FAA preempted Pennsylvania law that otherwise would hold the agreement to arbitrate unconscionable because it "provides [for] arbitration of disputes on an individual basis." 511 F.3d at 395.

As T-Mobile showed previously, Pet. 14-20, the Third Circuit's ruling squarely conflicts with the

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[1] Respondents do not and cannot dispute the importance of the question presented. *See* Brief for *Amicus Curiae* CTIA – The Wireless Ass'n In Support of Petitioners 2 ("the Ninth Circuit has undermined the utility of arbitration agreements and has cast uncertainty on the provisions contained in contracts of hundreds of millions of wireless customers"); Brief of AT&T Mobility LLC as *Amicus Curiae* In Support of Neither Party 4 (the question presented "is an important and recurring one").

decision below, which holds that the FAA does not compel enforcement of an agreement to arbitrate individually, Pet. App. 3a. The Third Circuit's holding in *Gay* cannot be so blithely dismissed. Opp. 1, 10. The *Gay* court disposed of the plaintiffs' unconscionability challenge on two grounds: one based on Virginia law and one based on FAA preemption. In the Third Circuit, as in this Court, "'an alternate holding has the same force as a single holding; it is binding precedent.'" *Mariana*, 338 F.3d at 201 (quoting *United States ex rel. Caruso* v. *Zelinsky*, 689 F.2d 435, 440 (3d Cir. 1982)); *In re Hammond*, 27 F.3d at 57 ("This panel is also bound by the alternate holding [in prior Third Circuit decisions]"); *accord Woods* v. *Interstate Realty Co.*, 337 U.S. 535, 537 (1949) ("[W]here a decision rests on two or more grounds, none can be relegated to the category of obiter dictum").

The *Gay* court's FAA preemption ruling is thus binding on district courts in the Third Circuit and may not be "overrul[ed]" by a "subsequent panel" absent rehearing en banc. *Mariana*, 338 F.3d at 201 (internal quotation marks omitted). Indeed, since T-Mobile filed its petition, federal district courts within the Third Circuit have relied on *Gay*'s FAA preemption ruling to reject state-law challenges to the enforcement of agreements to arbitrate in cases involving "class action waivers." See *Weinsten* v. *AT&T Mobility Corp.*, No. 07-2880, 2008 WL 1914754, at *5 (E.D. Pa. Apr. 30, 2008) (rejecting challenge to "class action waiver" based on "the Third Circuit's decision in *Gay*"); *Halprin* v. *Verizon Wireless Servs.*, LLC, No. 07-4015, 2008 WL 961239, at *6 (D.N.J. Apr. 8, 2008) (rejecting challenge to "class action waiver" because, under *Gay*, "the

uniqueness of the arbitration provision . . . is insufficient to maintain a claim of unconscionability").[2]

Given the indisputable conflict in analysis, respondents suggest that the Third Circuit in future cases might not follow *Gay* because it was based upon Pennsylvania state-law decisions that the Pennsylvania Supreme Court has "discredited" and "abrogated" because they "reflect[] an improper presumption in favor of unconscionability." Opp. 12 (citing *Salley* v. *Option One Mortgage Corp.*, 925 A.2d 115, 129 (Pa. 2007)). That argument fails because the *Gay* court was aware of the Pennsylvania Supreme Court's decision in *Salley*, and expressly concluded it did not affect its conclusion. 511 F.3d at 394 n.18 (*Salley* arose "in a very different context from that here").

Respondents next contend that the "'conflict' claimed by T-Mobile arises not from conflicting approaches to the federal-law question presented, but rather on underlying differences in state law." Opp. 14; see *id.* at 2 ("*Gay* . . . merely identifies a potential difference in state law"). Respondents' argument ignores that, in these decisions, each of these state courts applied the very same legal analysis that the Third Circuit in *Gay* ruled was preempted by the

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[2] Respondents mistakenly argue that the denial of certiorari in *Circuit City Stores, Inc.* v. *Gentry*, No. 07-998 (U.S. Mar. 31, 2008), addressed "the same question" presented here. Opp. 1. In *Gentry*, the California Supreme Court, on an interlocutory basis, adopted a standard for assessing the enforceability of individual arbitration of employment disputes separate and apart from the "unconscionability" standard applied by the Ninth Circuit in this case. There is no similar jurisdictional issue here. In any event, "the Court's action denying certiorari does not constitute either a decision on the merits of the questions presented, or an appraisal of their importance." *Brown* v. *Texas*, 522 U.S. 940, 942 (1997) (Stevens, J., respecting denial of certiorari) (citation omitted).

FAA. See Pet. 17-18 & nn.1-2 (explaining that decisions of the First Circuit, Washington Supreme Court, and New Jersey Supreme Court all followed the California Supreme Court's decision in Discover Bank).[3] In each of these states, agreements to arbitrate consumer claims individually were deemed "unconscionable" because they do not provide class-action procedures already available in litigation.

Finally, contrary to respondents' claim of "unanimity" among the lower courts, Opp. 1, 18-20, the *Gay* court's FAA ruling implicates a broader conflict among the federal courts of appeals. *Gay* based its FAA preemption ruling on a prior holding of that Circuit in *Johnson* v. *West Suburban Bank*, 225 F.3d 366, 373 (3d Cir. 2000), where the court ruled that individual arbitration allowed for the effective vindication of rights by consumers and that "[w]hatever the benefits of class actions, the FAA 'requires piecemeal resolution when necessary to give effect to an arbitration agreement.'" *Id.* at 375,

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[3] In *Thibodeau* v. *Comcast Corp.*, 912 A.2d 874 (Pa. Super. Ct. 2006), the Pennsylvania court based its refusal to enforce the parties' agreement to arbitrate individually on California law, as reflected in *Szetela* v. *Discover Bank*, 97 Cal. App. 4th 1094 (2002). *Szetela*, in turn, provided the analytical basis for the California Supreme Court's decision in *Discover Bank* v. *Superior Ct.*, 113 P.3d 1100 (Cal. 2005), which, in turn, was embraced by the Ninth Circuit in *Shroyer* v. *New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 981 (9th Cir. 2007). Likewise, the high courts in New Jersey, Illinois, and Washington each relied upon the same California law as the Pennsylvania court in *Thibodeau*. See *Muhammad* v. *County Bank*, 912 A.2d 88, 99 (N.J. 2006) (following *Discover Bank*), *cert. denied* 127 S. Ct. 2032 (2007); *Kinkel* v. *Cingular Wireless LLC*, 857 N.E.2d 250, 271 (Ill. 2006) (looking to state cases such as *Discover Bank* "to discern a pattern that might guide us"); *Scott* v. *Cingular Wireless*, 161 P.3d 1000, 1006 (Wash. 2007) (relying upon "our sister court" in *Discover Bank*).

quoted in Gay, 511 F.3d at 394. The ruling in *Johnson* upholding individual arbitration under the FAA was adopted by the Fourth, Seventh, and Eleventh Circuits. See Pet. 21-22. In stark contrast, the California Supreme Court rejected the Third Circuit's *Johnson* decision in *Discover Bank*, 113 P.3d at 1109, which was the basis for the Ninth Circuit's decision in *Shroyer* and that of the panel in this case.

Equally baseless are respondents' claims that review would "affirmatively interfere with the ongoing evolution" of agreements to arbitrate, Opp. 7, or that this case is a "poor vehicle" to resolve the conflict, *id.* at 20.

Respondents argue that review by this Court "would risk hindering the natural evolution" of a "new generation of agreements." *Id.* at 20. That argument is exactly backwards. The "evolution" of arbitration agreements has been shaped by judicial decisions interpreting and misinterpreting the proper scope of the FAA. As a result of the conflict among these decisions, an agreement to arbitrate on an individual basis that would be enforceable in the Third Circuit would not be enforced in the Ninth Circuit or in California courts based upon those courts' differing views of the requirements of federal law.

Resolution of that conflict will not "hinder" the further development of agreements to arbitrate, but will leave parties better able to make informed decisions regarding those agreements. Such development is best fostered when there is definitive guidance regarding the requirements of the FAA, rather than blind speculation about what incentives might be sufficient to pass muster under the competing approaches applicable in various jurisdictions throughout the country. Cf. *Arizona* v. *Evans*, 514

U.S. 1, 8 (1995) (a ruling by this Court facilitates further development by "disabus[ing]" courts and parties of their "erroneous view" of what federal law requires).

Finally, respondents assert that this case is not a proper vehicle because "it is doubtful that the T-Mobile arbitration agreement provides for the recovery of attorneys' fees where available under the applicable substantive law." Opp. 20; cf. AT&T Mobility Br. 20 (arguing that availability of attorneys' fees "is not clear"). That is not so. T-Mobile explained in the courts below that (i) the parties' agreement allows the arbitrator to "award as much relief as a court having jurisdiction in the place of arbitration," Pet. App. 36a-37a, and (ii) T-Mobile subsidizes the costs of arbitration, and even those subsidized costs are subject to waiver, *id.* at 36a; see also T-Mobile's Opening Ninth Circuit Br. 49 n.26.[4]

B. The Decision Below Violates The FAA And Conflicts With This Court's Decisions.

On the merits, respondents assert that T-Mobile's position "bristles" with "hostility" to arbitration and "class arbitration in particular," Opp. 3, 7, and that

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[4] The Ninth Circuit concluded (Pet. App. 2a) that T-Mobile's agreement was "not substantively distinguishable from the Cingular arbitration agreement" at issue in *Shroyer*, 498 F.3d at 976, *i.e.*, an agreement that allowed for recovery of attorneys' fees, *id.* at 986. But even if there were a doubt whether the arbitrator could award respondents "award as much relief as a court having jurisdiction in the place of arbitration," Pet. App. 37a – and there is none – this Court has held repeatedly that "the proper course" in these circumstances "is to compel arbitration." *PacifiCare Health Sys., Inc.* v. *Book*, 538 U.S. 401, 407 (2003) (following *Vimar Seguros y Reaseguros S.A.* v. *M/V Sky Reefer*, 515 U.S. 528, 541 (1995)).

the decision below properly interpreted the FAA in accordance with this Court's decisions, *id.* at 21-23. Both arguments should be rejected.

First, respondents' "hostility" argument betrays a fundamental misunderstanding of the purpose and benefits of arbitration under the FAA. According to respondents, courts can insist that arbitration precisely mimic litigation because such requirements would place arbitration on the "'*exact same footing*'" with litigation. Opp. 22. But, the "primary purpose" of the FAA is to "ensur[e] that private agreements to arbitrate are enforced according to their terms." *Volt Info. Scis., Inc.* v. *Board of Trs.*, 489 U.S. 468, 479 (1989). As this Court has explained, "by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'" *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991). Under the approach adopted by the Ninth Circuit and California Supreme Court, agreements to arbitrate on an individual basis are unenforceable precisely because their procedures differ from those in court litigation. Pet. 12-13, 28-29.

Second, Section 2 of the FAA mandates the enforcement of agreements to arbitrate save upon grounds available for the "revocation of any contract." 9 U.S.C. § 2. On its face, the test adopted by the California Supreme Court and adopted by the Ninth Circuit below applies only to certain consumer contracts, and not "any contract," as required by the FAA. See *Discover Bank*, 113 P.3d at 1110.

Respondents argue that the Ninth Circuit merely applied the generally-applicable principle that California will not enforce contract provisions that serve to exculpate a party from liability. Opp. 23. But the standard applied by *Discover Bank* and

Shroyer applies solely to a subset of consumer contracts, rather than "any contract," as required by the FAA. Moreover, California law is clear that the bar against exculpatory contracts set forth in California Civil Code § 1668,[5] "does not apply to every contract," *Vilner* v. *Crocker Nat'l Bank*, 89 Cal. App. 3d 732, 735 (1979), but only to contracts that involve the "public interest." *Tunkl* v. *Regents*, 383 P.2d 441, 443 (Cal. 1963); see also *Cregg* v. *Minister Ventures*, 148 Cal. App. 3d 1107, 1111 (1983) (same); 1 Witkin, *Summary of California Law* § 660, at 737-38 (10th ed. 2005) (same). Thus, the presumption against exculpatory contracts does not provide a basis for refusing to enforce an agreement to arbitrate individually because it is not a "ground[] as exist[s] in law or in equity for the revocation of any contract." 9 U.S.C. § 2 (emphasis added).

Moreover, the suggestion that individual arbitration would "exculpate" petitioners from liability simply ignores the contrary decisions of multiple federal courts of appeals, which have held that individual arbitration allows consumers effectively to vindicate their statutory rights. *E.g.*, *Johnson*, 225 F.3d at 373. The contrary conclusion adopted by the Ninth Circuit in *Shroyer*, *i.e.*, that the attorneys' fees that an arbitrator indisputably could award if respondents prevail on their substantive claims would be inadequate, hearkens back to the "longstanding judicial hostility to arbitration agreements." *Gilmer*, 500 U.S. at 24. Such a view cannot be reconciled with the "liberal federal policy

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[5] California Civil Code § 1668 provides: "All contracts which have for their object, directly or indirectly, to exempt any one from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law."

favoring arbitration agreements." *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); cf. *Gay*, 511 F.3d at 393 n.17 (noting that businesses have "a legitimate reason to seek to avoid expensive litigation to resolve disputes with [their] customers and instead resolve [their] disputes less formally and probably less expensively in arbitration").

CONCLUSION

For these reasons, and those set forth in the petition, the petition for a writ of certiorari should be granted.

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JENNIFER L. LASTER, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF AT&T MOBILITY LLC AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

AT&T Mobility LLC ("ATTM") submits this brief as amici curiae in support of neither party.[1]

INTEREST OF THE *AMICUS CURIAE*

ATTM (formerly Cingular Wireless LLC) is the largest wireless company in the United States, serving more than 70 million customers.[2] Since ATTM, then known as Cingular, began operating in October 2000, it has always included an arbitration provision in the terms and conditions of service that govern its customer agreements. ATTM uses individual arbitration as part of its dispute-resolution process because arbitration is a prompt, fair, inexpensive, and less adversarial method of resolving disputes with customers. As this Court has recognized, "arbitration's advantages often would seem helpful to *individuals*, say, complaining about a product, who need a less expensive alternative to litigation." *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 280 (1995) (emphasis added). Moreover, because arbitra-

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to this brief's preparation or submission. Counsel of record for both parties received timely notice of ATTM's intent to file this brief. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

[2] ATTM is a co-defendant in the present case. Like T-Mobile, ATTM moved to compel arbitration and appealed to the Ninth Circuit when the district court denied its motion. Unlike T-Mobile, ATTM dismissed its appeal after the Ninth Circuit released its opinion in *Shroyer* v. *New Cingular Wireless Services, Inc.*, 498 F.3d 976, 981-87 (9th Cir. 2007).

tion lowers ATTM's dispute-resolution costs, it ultimately benefits all ATTM customers in the form of lower prices.

ATTM has revised its arbitration provision on a number of occasions in an effort to make arbitration more attractive and convenient for its customers and to address case law and commentary critical of certain features that were common to early-generation arbitration provisions. ATTM's current provision, which became effective in December 2006 and is reproduced in the appendix, includes a number of innovative features that were designed to make individual arbitration a practical and efficient means for consumers to resolve their disputes with ATTM. Among other things, this provision:

- allows customers to arbitrate non-frivolous claims for free;
- expressly recognizes the customer's right to recover attorneys' fees whenever a court could award fees;
- provides in addition for an award of *double* attorneys' fees if the customer is awarded more than the amount of ATTM's last settlement offer;
- provides for a minimum award to the customer of at least $5,000 in the same circumstance;
- imposes no limitation on the arbitrator's power to award punitive damages;
- does not require that the arbitration be kept confidential;

- gives the customer complete discretion to decide whether arbitration shall be conducted in person, by telephone, or on the papers; and
- specifies that arbitration will be conducted in the county of the customer's billing address.

If a court ever were to hold that ATTM's 2006 arbitration provision nonetheless is unconscionable merely because it requires that arbitration be conducted on an individual basis (thereby precluding class actions in either arbitration or court), ATTM believes that such an interpretation of state contract law would be preempted by the Federal Arbitration Act ("FAA"). But thus far, the only court to address an unconscionability attack on this path-breaking arbitration provision has held that the provision is fully enforceable.

Because there is, as yet, no divergence of decisions regarding the enforceability of ATTM's new arbitration clause—or of the arbitration clauses employed by other companies that have undergone a similar evolution—ATTM believes that it is premature for this Court to wade into the thorny issue of whether the FAA sometimes, always, or never precludes States from declining to enforce class waivers in arbitration provisions. To be sure, we agree with T-Mobile that the FAA precludes States from striking down class waivers so long as the arbitration provision does not affirmatively burden the consumer's ability to obtain full redress. We submit, however, that the need for this Court to intervene could be eliminated, or the issue could be more sharply focused, by awaiting the further evolution of both consumer arbitration provisions and the law governing their enforceability. For these reasons,

ATTM has a strong interest in the issue presented in the petition in this case.

SUMMARY OF ARGUMENT

We agree with T-Mobile that the question whether the FAA preempts a state-law rule invalidating an arbitration provision merely because it requires arbitration to be conducted on an individual basis is an important and recurring one. We submit, however, that the time is not yet right for this Court to decide the issue.

As we discuss below, consumer arbitration provisions have been evolving. At first, many provisions plainly favored the business that drafted them. Invoking state unconscionability principles, several courts struck down these clauses, concluding that they impeded customers' ability to receive full redress for their claims.

In response, businesses committed to the use of arbitration, including ATTM, jettisoned this first generation of arbitration provisions and developed a second generation, which eliminated most of the features that courts had singled out for criticism. Some courts and commentators continued to criticize the second generation of arbitration provisions on the ground that they still did not go far enough to make individual arbitration a realistic means of resolving small claims. Although continuing to maintain that its second-generation provision was fully enforceable and that the FAA would preempt any holding to the contrary, ATTM nevertheless responded to these criticisms by promulgating a third-generation arbitration provision, which, among other things, includes affirmative inducements for consumers and their attorneys to pursue individual arbitration.

To date, the only court to render a ruling on ATTM's third-generation provision has held that it is fully enforceable. State-law challenges to this provision currently are pending in district courts in the Third, Sixth, Seventh, Ninth, and Eleventh Circuits. Decisions as to the enforceability of this provision—and, if necessary, as to whether the FAA would preempt any interpretation of state law under which the provision would be unenforceable—are imminent.

Other companies have created different kinds of third-generation clauses. For example, a number of companies now permit their customers to opt out of arbitration with no adverse consequences. Others offer a lower price in exchange for the customer's agreement to arbitrate.

ATTM submits that the Court should await a case involving one of these third-generation arbitration provisions (either ATTM's or one like it) before resolving the knotty question of whether and, if so, when, the FAA preempts the application of state unconscionability law to declare an arbitration provision containing a class waiver unenforceable. By awaiting such a case, instead of deciding the issue now, the Court will allow the continued evolution of both arbitration clauses and the law governing their enforceability.

Indeed, a decision now, in the context of T-Mobile's arbitration provision, would threaten to bring that process of evolution to a complete stop. A ruling that courts cannot refuse to enforce T-Mobile's provision would eliminate any incentive for other companies to emulate ATTM's innovative attempts to make arbitration affirmatively attractive for customers. Meanwhile, a ruling upholding the invalidation of T-Mobile's clause could embolden some courts

to strike down third-generation clauses, like ATTM's, that contain affirmative inducements to invoke individual arbitration. That in turn could be the death knell for consumer arbitration entirely, as few businesses are likely to be willing to expose themselves to the risk of a class-wide arbitration as a condition of having an enforceable arbitration provision.

If the Court were to refrain from intervening at this time, on the other hand, it is possible that the lower courts might uniformly uphold third-generation clauses like ATTM's, thereby obviating the need for the Court to decide the preemption issue. And if the lower courts instead were to divide on that question, the issue then would be much more sharply focused: whether the FAA preempts what is effectively a categorical state-law rule that the inclusion of a class waiver in a consumer arbitration provision is unconscionable.

The current case does not present that clear-cut question. To begin with, it is debatable whether T-Mobile's arbitration provision permits arbitrators to award attorneys' fees under applicable fee-shifting statutes. It therefore is not certain that this case even presents the question whether the FAA preempts States from refusing to enforce class waivers when the arbitration provision does not affirmatively limit the remedies available to the customer.

Moreover, regardless of how the T-Mobile provision is construed, the issue here is certain to be much murkier than it would be in a case in which it is clear that the State has adopted an essentially per se rule against the enforcement of class waivers. Until such a case is presented, it makes little sense for this Court to take up a comparatively more difficult case

that may not finally resolve the issue. The petition here accordingly should be denied.

ARGUMENT

I. THE EVOLUTION OF CONSUMER ARBITRATION AGREEMENTS AND STATE UNCONSCIONABILITY LAW.

A. Some Courts Refused To Enforce First-Generation Arbitration Clauses That Limited Remedies, Required Consumers To Pay Significant Arbitration Fees, Or Otherwise Afforded An Unfair Advantage To The Drafter.

Many early consumer arbitration clauses included some combination of the following features: a requirement that the consumer pay significant arbitration fees; a preclusion of important remedies, such as punitive damages or the right to recover attorneys' fees under applicable fee-shifting statutes; a confidentiality requirement; a provision that allowed the drafter the option of bringing specified claims in court rather than only in arbitration; or a requirement that arbitration take place in an inconvenient location. In a number of cases, courts deemed such features "unconscionable" or otherwise unenforceable under state law and therefore refused to enforce the arbitration provision that included them.

For example, in *State ex rel. Dunlap* v. *Berger*, 567 S.E.2d 265 (W. Va. 2002), a jewelry retailer's financing agreement included an arbitration clause that, in addition to requiring individual arbitration, (i) obligated the customer to pay half of all arbitration fees, (ii) prohibited the arbitrator from awarding punitive damages, and (iii) excepted from arbitration

the categories of claims that the defendant was likely to bring. See *id.* at 270, 277-78, 280 n.12, 281. The court held that such a provision was unconscionable because it "would prohibit or substantially limit" the plaintiff—who alleged actual damages of only $8.46—from vindicating his legal rights. See *id.* at 278, 280.

Similarly, in a case involving allegations of predatory lending, a federal district court refused to enforce an arbitration clause because of the combined effect of provisions that (i) obligated the borrower to pay at least half of all arbitration fees; (ii) required that the arbitration be confidential; (iii) prohibited class-wide proceedings; and (iv) preserved judicial remedies for the lender. *ACORN* v. *Household Int'l, Inc.*, 211 F. Supp. 2d 1160, 1170-74 (N.D. Cal. 2002). As to the clause's confidentiality requirement, the court expressed concern that such a provision would "effectively conceal[]" from "critical" "scrutiny" the lenders' advantage as "repeat players" in arbitration and would also prevent successful claimants from alerting other consumers to arbitral rulings declaring particular practices unlawful. See *id.* at 1172.

The Pennsylvania Superior Court likewise refused to enforce an arbitration clause in a consumer's contract with a pest control company that prohibited the arbitrator from awarding "(i) the repair or replacement of any damage to the identified property, (ii) loss of anticipated rents and/or profits, (iii) direct, indirect, special, incidental, consequential, exemplary or punitive damages, or (iv) damages or penalties relating to or arising out of any claim alleging any deceptive trade practice." *Carll* v. *Terminix Int'l Co.*, 793 A.2d 921, 923 (Pa. Super. 2002). The

agreement also required the consumer to bear half of the arbitrator's fees and expenses and appeared to preclude any award of attorneys' fees. See *ibid.*

More recently, a Missouri appellate court struck down a consumer arbitration clause that limited the arbitrator to awarding a refund of charges incurred by the consumer and prohibited any award of "incidental or consequential damages, * * * punitive or exemplary damages, or attorneys' fees." *Whitney* v. *Alltel Commc'ns, Inc.*, 173 S.W.3d 300, 304 n.3 (Mo. App. 2005) (emphasis omitted). The clause also required the consumer to pay part of the cost of arbitration and to arbitrate individually. See *id.* at 304. Given that the consumer alleged only $24.64 in actual damages, the court concluded that the provision was unconscionable. See *id.* at 311-14.

Other of these "first-generation" clauses required the customer to arbitrate all of his or her claims but allowed the business to pursue its claims in court. *E.g.*, *Showmethemoney Check Cashers, Inc.* v. *Williams*, 27 S.W.3d 361 (Ark. 2000) (refusing to enforce an arbitration clause in a payday lending agreement that required arbitration of "[a]ll disputes and controversies of every kind and nature between the parties * * * except, only, insofar as actions of [the lender] to collect amounts due it"). In such circumstances, the Arkansas Supreme Court concluded, "[t]he laudable policy behind enforcing arbitration agreements"—*i.e.*, "provid[ing] a less expensive, more expeditious means of settling litigation and relieving congested court dockets"—is perverted because the arbitration provision is used as a "shield against litigation by one party while simultaneously reserving solely to itself the sword of a court action." *Id.* at 367.

Still other first-generation clauses appeared to be designed to deter customers from pursuing claims by requiring that arbitration take place in a distant location. For example, in one case a credit repair service attempted to enforce an arbitration clause that would have required its already financially distressed customers to travel from Illinois to Florida to arbitrate and to pay arbitration fees of several thousand dollars. See *Arnold* v. *Goldstar Fin. Sys., Inc.*, 2002 U.S. Dist. LEXIS 15564, at *22-*23, *32-*36 (N.D. Ill. Aug. 20, 2002). The district court denied the business's motion to compel arbitration, reasoning that the arbitration clause imposed "prohibitive expenses" that would prevent the plaintiffs from vindicating their rights under the Truth in Lending Act, 15 U.S.C. § 1679 *et seq.*

Finally, some particularly egregious consumer arbitration clauses granted one side advantages such as "the unilateral and exclusive right to decide the rules that [would] govern the arbitration and to select the arbitrators." *Burch* v. *Second Judicial Dist.*, 49 P.3d 647, 650-51 (Nev. 2002). The Nevada Supreme Court, among others, had little difficulty determining that such a clause was unconscionable. *Id.* at 651.

ATTM's first-generation arbitration provision was also criticized by some courts for, in some circumstances, failing to "provide a cost-effective mechanism for individual customers to obtain a remedy for the specific injury alleged." *Kinkel* v. *Cingular Wireless, LLC*, 857 N.E.2d 250, 278 (Ill. 2006). In *Kinkel*, the Illinois Supreme Court declined to enforce ATTM's first-generation provision (which had already long since been superseded) because the plaintiff's claims were only $150 and her arbitration

provision required her to pay $125 in arbitration fees; the court also noted that ATTM's provision generally prohibited punitive damages. See *id.* at 257, 267-68, 278. But see, *e.g.*, *Iberia Credit Bureau, Inc.* v. *Cingular Wireless LLC*, 379 F.3d 159, 171-76 (5th Cir. 2004) (upholding ATTM's first-generation arbitration provision under Louisiana law).

B. Case Law Addressing First-Generation Clauses Resulted In Improved, Second-Generation Consumer Arbitration Provisions.

ATTM and other companies responded to the decisions invalidating first-generation arbitration provisions by revising their arbitration agreements to address the concerns expressed in those decisions.[3] In general, these "second-generation" provisions require companies to pay most or all of the cost of arbitration; authorize arbitrators to award all substantive remedies available in court, including punitive damages and attorneys' fees; and eliminate other features deemed problematic, such as confidentiality requirements and inconvenient hearing locations.

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[3] See, *e.g.*, John M. Townsend, *State Court Enforcement of Arbitration Agreements*, at 9 (U.S. Chamber Inst. for Leg. Reform, Oct. 2006) (advising "businesses wishing to secure the benefits of an arbitral forum" to "avoid the temptation to craft arbitration clauses that appear to tilt the process against the consumer"), available at http://tinyurl.com/2pkuq4; Alan S. Kaplinsky, *The Use of Pre-Dispute Arbitration Agreements by Consumer Financial Services Providers*, 1414 PLI/Corp 305, 315 (2004) ("My message to clients: Draft a fair clause!"); Eric J. Mogilnicki & Kirk D. Jensen, *Arbitration and Unconscionability*, 19 GA. ST. L. REV. 761, 784 (2003) (explaining that "unconscionable arbitration provisions spawn costly litigation," thereby defeating the purpose of arbitration from a business's perspective).

ATTM's second-generation provision went a step further by granting customers a *contractual* right to attorneys' fees in the event that they recover an amount equal to or greater than their demand.

Many courts have held that second-generation provisions of this sort are enforceable, rejecting arguments that they are "unconscionable" merely because they require arbitration on an individual basis. The Eleventh Circuit's opinion in *Jenkins* v. *First American Cash Advance*, 400 F.3d 868 (11th Cir. 2005), is typical of these decisions. There, the court reasoned that individual arbitration was feasible—and that a class waiver was not unconscionable—because "arbitration costs would not be expensive" and the arbitration agreement permitted an award of attorneys' fees under applicable law. See *id.* at 878 & n.8.

Other courts, however, have continued to express a broader concern that individual arbitration generally is not a viable mechanism for resolving small consumer claims. The California Supreme Court's decision in *Discover Bank* v. *Superior Court*, 113 P.3d 1100 (Cal. 2005), is a notable example. On its face at least, the opinion does "not hold that all class action waivers are necessarily unconscionable." *Id.* at 1110. Instead, the court emphasized that a class waiver should be deemed to be unconscionable when it "*operate[s] to insulate a party from liability* that otherwise would be imposed under California law" and "becomes *in practice* the exemption of the party from responsibility for its own fraud, or willful injury to the person or property of another." *Id.* at 1109, 1110 (emphasis added; internal quotation marks and brackets omitted).

Applying *Discover Bank*, the Ninth Circuit recently held that ATTM's second-generation provision is unconscionable and unenforceable. See *Shroyer*, 498 F.3d at 981-87. In *Shroyer*, ATTM sought to distinguish *Discover Bank* on the ground that ATTM's provision required ATTM to pay the entire cost of arbitration (unless the customer's claim is deemed frivolous) and also required the arbitrator to award reasonable attorneys' fees to any customer who obtained relief equal to or greater than his or her demand (regardless of whether the customer would be entitled to attorneys' fees under applicable law). *Id.* at 986. The Ninth Circuit concluded, however, that these differences did not alter the result under *Discover Bank* because the California Supreme Court was "concerned that when the potential for individual *gain* is small, very few plaintiffs, if any, will pursue individual arbitration or litigation." *Ibid.* (emphasis by the court).

The Washington Supreme Court voiced similar concerns with ATTM's second-generation provision. See *Scott* v. *Cingular Wireless, LLC*, 161 P.3d 1000 (Wash. 2007). That court held "only that class action waivers that *prevent* vindication of rights secured by the [state consumer protection act] are invalid," explaining that "whether any particular class action waiver is unenforceable will turn on the facts of the particular case." *Id.* at 1009 n.7 (emphasis by the court). The court further stated that it could "certainly conceive of situations where a class action waiver would not prevent a consumer from vindicating his or her substantive rights under the [state consumer protection act] and would thus be enforceable." *Ibid.* (internal citation omitted).

In concluding that the *Scott* plaintiffs would be unable to vindicate their rights under ATTM's second-generation provision, the Washington Supreme Court, like the Ninth Circuit and the California Supreme Court before it, emphasized the "small amount" of damages at issue (*id.* at 1009), predicting that no consumer would pursue small individual claims relating to alleged billing overcharges (*id.* at 1007).[4] See also *Lowden* v. *T-Mobile USA, Inc.*, 512 F.3d 1213 (9th Cir. 2008) (invalidating T-Mobile's arbitration provision under *Scott*).

C. Businesses Are In The Process Of Developing New, Third-Generation Arbitration Provisions That The Courts Are Only Now Beginning To Address.

In an effort to make arbitration more attractive to its customers, and in anticipation of the concerns raised in *Scott* and *Shroyer*, ATTM had already made further improvements to its arbitration provision by the time those cases were decided.[5] In creating its third-generation provision, which went into effect in December 2006, ATTM consulted with, among others, Professor Richard A. Nagareda of Vanderbilt

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[4] In contrast with *Shroyer* and *Scott*, courts in Illinois and Missouri rejected unconscionability challenges to ATTM's second-generation provision. *Franczyk* v. *Cingular Wireless, LLC*, No. 03 CH 14203 (Ill. Cir. Ct. June 13, 2005); *Blitz* v. *AT&T Wireless Servs., Inc.*, No. 054-00281 (Mo. Cir. Ct. Nov. 28, 2005).

[5] Because ATTM believes that the preemption issue is best resolved in a case involving its revised provision or one like it, ATTM dismissed its appeal in this case after the Ninth Circuit decided *Shroyer*.

University Law School, whose scholarship focuses on aggregate dispute resolution.[6]

ATTM's third-generation arbitration provision—like its predecessor—allocates the entire cost of arbitration to ATTM (unless the customer's claims are deemed frivolous); permits either party to proceed in small claims court in lieu of arbitration; provides for arbitration under the AAA's consumer arbitration rules and in the county of the customer's billing address; and contains no confidentiality requirement or limitation on the arbitrator's authority to award punitive damages. See App., *infra*, 1a-4a.

The third-generation provision in addition contains three new features that were designed to make

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[6] Professor Nagareda has adopted an intermediate position on the enforceability of class waivers; he neither accepts that all class waivers are categorically unenforceable when claims are small nor endorses the view that class waivers are categorically enforceable so long as the arbitration provision does not restrict the remedies available to the consumer. Under the approach set forth in his 2006 *Columbia Law Review* article, many arbitration provisions would likely be unenforceable when claims are small, because those provisions do not provide a sufficient incentive for consumers and attorneys to pursue such claims. See *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872, 1904 (2006) ("The real question about a given waiver of class-wide arbitration is whether, if enforced, it effectively would write private enforcement out of the underlying statute. This question calls for courts to examine carefully the framework for the bringing of claims on an individual basis—specifically, the financial arrangements to do so in the absence of aggregation."). Professor Nagareda, who had completed the last round of changes to this article and posted it on the Social Science Research Network prior to being contacted by ATTM, has testified that, under the framework set forth in his article, ATTM's revised provision should not be deemed unconscionable.

individual arbitration attractive to ATTM's customers and their attorneys (if any), even when the amount of the claim is modest. First, in most cases that would be brought by a consumer, the agreement provides for a minimum award (denominated a "premium") if the arbitrator awards the customer more than the amount of ATTM's last settlement offer.[7] The premium is defined as $5,000 or the jurisdictional limit in the customer's local small claims court, whichever is greater. *Id.*, 5a. In some jurisdictions, the small claims court jurisdictional limit—and, therefore, the premium under ATTM's arbitration provision—is as much as $15,000 or even $25,000.[8]

Second, under the same circumstances, ATTM will "pay [the customer's] attorney, if any, ***twice*** the amount of attorneys' fees, and reimburse any expenses, that [the] attorney reasonably accrues for investigating, preparing, and pursuing [the customer's] claim in arbitration." App., *infra*, 5a (emphasis added). The arbitration provision also makes clear that this "right to attorneys' fees and expenses * * * supplements any right to attorneys' fees and expenses [the customer] may have under applicable law." *Id.*, 5a-6a.[9] Hence, customers who are

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[7] This opportunity to obtain the premium is available whenever the arbitral award is less than or equal to the greater of $5,000 or the jurisdictional limit of the small claims court in the county of the customer's residence. App., *infra*, 5a.

[8] See 10 Del. Code § 9301(1) ($15,000); Ga. Code § 15-10-2(5) ($15,000), Tenn. Code § 16-15-501(d)(1) ($25,000).

[9] At the same time, to avoid deterring customers from pursuing arbitration, the arbitration provision expressly disclaims any right to attorneys' fess that ATTM might have under applicable law.

awarded less than ATTM's last settlement offer may still be entitled to an award of attorneys' fees to the same extent as they would be in court.

Third, in an effort to make arbitration as convenient as possible for ATTM's customers, the arbitration provision grants the customer the exclusive right to "choose whether the arbitration will be conducted solely on the basis of documents submitted to the arbitrator, through a telephonic hearing, or by an in-person hearing." *Id.*, 4a.

The "premium" in the revised ATTM provision thus creates a meaningful "potential for individual *gain*" (*Shroyer*, 498 F.3d at 986) and addresses the concern that individuals will not think it worthwhile to pursue "small amounts" of damages (*Discover Bank*, 113 P.3d at 1110; *Scott*, 161 P.3d at 1009). Similarly, the "attorney premium" in the revised provision addresses the concern expressed by some courts that attorneys will be disinclined to represent individual consumers with small claims. See, *e.g.*, *Scott*, 161 P.3d at 1007. Finally, by giving the customer the exclusive right to decide whether the arbitration will be in-person, telephonic, or based solely on the papers, the revised provision addresses the concern that customers will conclude that it is not "worth the time, energy, and stress to pursue" a claim individually. *Ibid.*

Practitioners currently are encouraging other companies to build financial incentives into their arbitration provisions. For example, during a recent CLE program, one well-known attorney in this field reported that he has advised clients to adopt a "bump-up" approach, under which the arbitrator's award automatically is increased to $100 above the limit for small claims court. See CLE Program,

Class Action Arbitration Clauses Under Fire; Crafting Agreements to Withstand Court Scrutiny (May 16, 2007) (comments of Alan S. Kaplinsky), CD available for purchase at http://www.straffordpub.com/products/classarb2/ (last visited Feb. 21, 2008).

Other companies, such as Comcast and Discover Bank, have created a different type of third-generation clause by affording customers a period of time in which they may "opt out" of the arbitration agreement.[10] See http://www6.comcast.net/terms/subscriber/, at ¶ 13(c) (last visited Feb. 21, 2008); http://tinyurl.com/yohr8e (Discover Bank); see also, *e.g.*, http://tinyurl.com/365r7r, at ¶ 22 (CorTrust Bank); http://tinyurl.com/2rwhq3 (E*TRADE Financial).

Similarly, some practitioners in this area are encouraging companies to offer "bifurcated pricing," which entails giving customers the option of agreeing to arbitrate in return for a lower price reflecting the cost savings that arbitration creates. Like an "opt-out" provision, this option would address the criti-

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[10] In most states, a contract will be deemed unenforceable on unconscionability grounds only if it is both procedurally and substantively unconscionable—*i.e.*, only if the manner in which the contract was entered into was unfair and its terms are substantively unfair. Some courts have suggested that the mere fact that a contract is non-negotiable is enough to satisfy the procedural component of unconscionability. See, *e.g.*, Pet. App. 17a. If the customer is offered a period of time in which to opt out of arbitration, the arbitration provision no longer can be said to be non-negotiable, and this basis for finding procedural unconscionability is thus eliminated. See, *e.g.*, *Sanders* v. *Comcast Cable Holdings, LLC*, 2008 WL 150479, at *7, *10 (M.D. Fla. Jan. 14, 2008) (holding that Comcast's arbitration provision and class waiver are not procedurally or substantively unconscionable based in part on the customer's right to opt out).

cism that customers lack a choice as to whether to agree to individual arbitration. See, *e.g.*, CLE Program Outline, *Class Action Arbitration Clauses Under Fire; Crafting Agreements To Withstand Court Scrutiny* (May 16, 2007) (suggesting use of an "[o]pt-out right or bifurcated pricing" in consumer arbitration agreements), available at http://www.straffordpub.com/products/classarb2/ProgramOutline.pdf (last visited Feb. 21, 2008); Robert Leventhal & Howard Cohen, *Mandatory Arbitration Clauses: Powerful When Used Correctly*, L.A. BUS. J., Nov. 3, 2003 ("customers could be offered a lower price if they agree to the arbitration provision").

Because these third-generation arbitration provisions are a relatively new development, there are, as yet, few judicial decisions addressing their enforceability. For example, although customers have raised unconscionability attacks on ATTM's revised arbitration provision in district courts within five circuits under the laws of eleven states, to date only one court has issued a ruling. That court held that ATTM's revised arbitration clause is fully enforceable. See *Davidson* v. *Cingular Wireless LLC*, 2007 WL 896349 (E.D. Ark. Mar. 23, 2007). Decisions are imminent in several other cases.

II. THIS COURT SHOULD WAIT FOR A CASE INVOLVING A THIRD-GENERATION ARBITRATION PROVISION TO ADDRESS WHETHER THE FAA SOMETIMES, ALWAYS, OR NEVER PREEMPTS STATES FROM DECLINING TO ENFORCE CLASS WAIVERS IN ARBITRATION PROVISIONS.

The certiorari petition describes the decision below as holding that T-Mobile's arbitration provision is unconscionable even though the plaintiff can re-

cover attorneys' fees if she prevails on her claims. See Pet. 13. Indeed, the claim of a circuit-split is dependent on that contention. See Pet. 15-16, 21-22. The courts below did not interpret the provision, however, and its meaning is not clear.

The T-Mobile arbitration provision at issue in this case states:

> You will pay your share of the arbitrator's fees except: (a) for claims less than $25, we will pay all arbitrator's fees and (b) for claims between $25 and $1000, you will pay $25 for the arbitrator's fee. *You and we agree to pay our own other fees, costs and expenses including those for counsel, experts, and witnesses.*

Pet. App. 37a (emphasis added). Although T-Mobile argues that the provision permits recovery of attorneys' fees authorized under the applicable substantive law,[11] the three decisions available on electronic databases that have addressed the issue have concluded that T-Mobile's provision does ***not*** allow for fee shifting. *Chalk* v. *T-Mobile USA, Inc.*, 2006 WL 2599506, at *6-*7 (D. Or. Sept. 7, 2006); *Lowden* v. *T-Mobile USA, Inc.*, 2006 WL 1009279, at *8 (W.D. Wash. Apr. 13, 2006), *aff'd*, 512 F.3d 1213 (9th Cir.

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[11] T-Mobile asserted in the Ninth Circuit that the following sentence (which appears earlier in the same paragraph as the sentence quoted above) authorizes the arbitrator to award attorneys' fees to the same extent as a court: "An arbitrator may only award as much relief as a court having jurisdiction in the place of arbitration, limited to the same extent that a court would limit such relief and consistent with the provisions of the Agreement." Pet. App. 36a-37a.

2008); *Janda* v. *T-Mobile, USA, Inc.*, 2006 WL 708936, at *8 (N.D. Cal. Mar. 17, 2006).[12]

Because T-Mobile's argument under the FAA is premised on the proposition that its arbitration clause permits the award of all statutorily-authorized remedies, this Court is confronted at the outset with a question of contract interpretation: Does T-Mobile's provision prohibit an arbitrator from shifting attorneys' fees, as the sentence emphasized above appears to convey, or does it allow an arbitrator to award attorneys' fees whenever a court could do so, as T-Mobile contends? Of course, "state law, not federal, normally governs such matters" "of contract interpretation." *Green Tree Fin. Corp.* v. *Bazzle*, 539 U.S. 444, 450 (2003) (plurality opinion).

Even if T-Mobile's reading of its arbitration provision is the more persuasive one, the fact that the provision does not *unambiguously* authorize fee shifting (and that T-Mobile provides no clarification on its web site) makes this case a less than ideal vehicle for addressing whether States may refuse to enforce class waivers in second-generation arbitration provisions consistent with the FAA.

More fundamentally—and wholly apart from this factual issue—as we have discussed, both the substance of consumer arbitration provisions and the law governing their enforceability are evolving. The

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[12] The arbitration provision at issue here is identical to the one in *Chalk*. The version at issue in *Lowden* and *Janda* contained the same affirmative statement that the parties are responsible for their own attorneys' fees but, in addition, specified that "[a]n arbitrator may not award relief in excess or inconsistent with the provisions of the Agreement." *Lowden*, 2006 WL 1009279, at *1, *8; *Janda*, 2006 WL 708936, at *1, *8.

coming wave of decisions addressing third-generation arbitration provisions could put the preemption issue to rest without necessitating this Court's involvement by making clear that these provisions are fully enforceable under state law. Alternatively, if one or more federal courts of appeals holds that even third-generation arbitration provisions are unenforceable under state law, the preemption issue will be much more sharply presented. In that circumstance, it will be clear that state law categorically precludes an enforceable consumer arbitration provision that requires individual arbitration, and the question for the Court will be whether the FAA preempts states from imposing a de facto across-the-board ban on consumer arbitration provisions that require individual arbitration. That is a far clearer issue than the one presented here, which involves an arbitration provision that does not unambiguously allow fee shifting and does not affirmatively provide inducements to customers and their lawyers to pursue small claims on an individual basis.

This Court has "in many instances recognized that when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court." *Arizona* v. *Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting). In some cases, "it is a sound exercise of discretion for the Court to allow the various States to serve as laboratories in which the issue receives further study before it is addressed by this Court." *McCray* v. *New York*, 461 U.S. 961, 963 (1983) (Stevens, J., respecting the denial of petitions for writs of certiorari). This is such a case.

The California Supreme Court, the Washington Supreme Court, and the Ninth Circuit have all professed that they are not applying a rule that would invalidate all consumer agreements that require individual arbitration. See *Discover Bank*, 113 P.3d at 1110 ("We do not hold that all class action waivers are necessarily unconscionable."); *Shroyer*, 498 F.3d at 983 (same); *Scott*, 161 P.3d at 1009 n.7 ("We can certainly conceive of situations where a class action waiver would not prevent a consumer from vindicating his or her substantive rights[.]"). If that is true, and these courts ultimately conclude that third-generation arbitration provisions are not unconscionable, then such provisions will become the norm, and the preemption issue will become largely unimportant, if not entirely moot. That is a very good reason for the Court to deny review at this time. See Hon. John Paul Stevens, *Some Thoughts on Judicial Restraint*, 66 JUDICATURE 177, 183 (1982) ("The doctrine of judicial restraint teaches us that patience in the judicial resolution of conflicts may sometimes produce the most desirable result."); *Maryland* v. *Baltimore Radio Show*, 338 U.S. 912, 918 (1950) (Frankfurter, J., respecting the denial of certiorari) ("A case may raise an important question but the record may be cloudy. It may be desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening.").

Alternatively, if these courts refuse to enforce third-generation consumer arbitration provisions, it will then be plain that they are in fact applying a per se rule that consumer agreements to arbitrate individually are unenforceable. Moreover, such consumer-friendly provisions will force these courts to articulate their per se rule in its clearest, final form.

And by clarifying the issue and the underlying rationale for these courts' state-law holdings, decisions in third-generation cases would "yield a better informed and more enduring final pronouncement by this Court." *Evans*, 514 U.S. at 23 n.1 (Ginsburg, J., dissenting).

CONCLUSION

The Court should deny the petition.

Respectfully submitted.

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FEBRUARY 2008

APPENDIX

APPENDIX

DISPUTE RESOLUTION BY BINDING ARBITRATION

Please read this carefully. It affects your rights.

Summary:
Most customer concerns can be resolved quickly and to the customer's satisfaction by calling our customer service department at 800-331-0500. **In the unlikely event that AT&T's customer service department is unable to resolve a complaint you may have to your satisfaction (or if AT&T has not been able to resolve a dispute it has with you after attempting to do so informally), we each agree to resolve those disputes through binding arbitration or small claims court instead of in courts of general jurisdiction.** Arbitration is more informal than a lawsuit in court. Arbitration uses a neutral arbitrator instead of a judge or jury, allows for more limited discovery than in court, and is subject to very limited review by courts. Arbitrators can award the same damages and relief that a court can award. **Any arbitration under this Agreement will take place on an individual basis; class arbitrations and class actions are not permitted.** AT&T will pay all costs of arbitration, no matter who wins, so long as your claim is not frivolous. Moreover, in arbitration you are entitled to recover attorneys' fees from AT&T to at least the same extent as you would be in court. In addition, under certain circumstances (as explained below), AT&T will pay you and your attorney a special premium if the arbitrator awards you an amount

that is greater than what AT&T has offered you to settle the dispute.

ARBITRATION AGREEMENT

(1) AT&T and you agree to arbitrate **all disputes and claims** between us. This agreement to arbitrate is intended to be broadly interpreted. It includes, but is not limited to:

- claims arising out of or relating to any aspect of the relationship between us, whether based in contract, tort, statute, fraud, misrepresentation or any other legal theory;
- claims that arose before this or any prior Agreement (including, but not limited to, claims relating to advertising);
- claims that are currently the subject of purported class action litigation in which you are not a member of a certified class; and
- claims that may arise after the termination of this Agreement.

References to "AT&T," "you," and "us" include our respective subsidiaries, affiliates, agents, employees, predecessors in interest, successors and assigns, as well as all authorized or unauthorized users or beneficiaries of services or equipment under this or prior Agreements between us. Notwithstanding the foregoing, either party may bring an individual action in small claims court. **You agree that, by entering into this Agreement, you and AT&T are each waiving the right to a trial by jury or to participate in a class action.** This Agreement evidences a transaction in interstate commerce, and thus the Federal Arbitration Act governs the interpretation and enforcement of this provision. This

arbitration provision shall survive termination of this Agreement.

(2) A party who intends to seek arbitration must first send to the other, by certified mail, a written Notice of Dispute ("Notice"). The Notice to AT&T should be addressed to: General Counsel, AT&T Mobility LLC, 5565 Glenridge Connector, 20th Floor, Atlanta, GA 30342 ("Notice Address"). The Notice must (a) describe the nature and basis of the claim or dispute; and (b) set forth the specific relief sought ("Demand"). If AT&T and you do not reach an agreement to resolve the claim within 30 days after the Notice is received, you or AT&T may commence an arbitration proceeding. During the arbitration, the amount of any settlement offer made by AT&T or you shall not be disclosed to the arbitrator until after the arbitrator determines the amount, if any, to which you or AT&T is entitled. You may download or copy a form Notice and a form to initiate arbitration from here: http://www.wireless.att.com/arbitration-forms.

(3) After AT&T receives notice at the Notice Address that you have commenced arbitration, it will promptly reimburse you for your payment of the filing fee. (The filing fee currently is $125 for claims under $10,000, but is subject to change by the arbitration provider. If you are unable to pay this fee, AT&T will pay it directly upon receiving a written request at the Notice Address.) The arbitration will be governed by the Commercial Dispute Resolution Procedures and the Supplementary Procedures for Consumer Related Disputes (collectively, "AAA Rules") of the American Arbitration Association ("AAA"), as modified by this Agreement, and will be

administered by the AAA. The AAA Rules are available online at www.adr.org, by calling the AAA at 1-800-778-7879, or by writing to the Notice Address. (You may obtain information that is designed for non-lawyers, about the arbitration process at http://www.wireless.att.com/arbitrationinformation). All issues are for the arbitrator to decide, including the scope of this arbitration provision, but the arbitrator is bound by the terms of this Agreement. Unless AT&T and you agree otherwise, any arbitration hearings will take place in the county (or parish) of your billing address. If your claim is for $10,000 or less, we agree that you may choose whether the arbitration will be conducted solely on the basis of documents submitted to the arbitrator, through a telephonic hearing, or by an in-person hearing as established by the AAA Rules. If your claim exceeds $10,000, the right to a hearing will be determined by the AAA Rules. Except as otherwise provided for herein, AT&T will pay all AAA filing, administration and arbitrator fees for any arbitration initiated in accordance with the notice requirements above. If, however, the arbitrator finds that either the substance of your claim or the relief sought in the Demand is frivolous or brought for an improper purpose (as measured by the standards set forth in Federal Rule of Civil Procedure 11(b)), then the payment of all such fees will be governed by the AAA Rules. In such case, you agree to reimburse AT&T for all monies previously disbursed by it that are otherwise your obligation to pay under the AAA Rules.

(4) If, after finding in your favor in any respect on the merits of your claim, the arbitrator issues you an award that is:

- equal to or less than the greater of (a) $5,000 or (b) the maximum claim that may be brought in small claims court in the county of your billing address; and
- greater than the value of AT&T's last written settlement offer made before an arbitrator was selected,

then AT&T will:

- pay you the greater of (a) $5,000 or (b) the maximum claim that may be brought in small claims court in the county of your billing address ("the premium") instead of the arbitrator's award; and
- pay your attorney, if any, twice the amount of attorneys' fees, and reimburse any expenses, that your attorney reasonably accrues for investigating, preparing, and pursuing your claim in arbitration ("the attorney premium").

If AT&T did not make a written offer to settle the dispute before an arbitrator was selected, you and your attorney will be entitled to receive the premium and the attorney premium, respectively, if the arbitrator awards you any relief on the merits. The arbitrator may make rulings and resolve disputes as to the payment and reimbursement of fees, expenses, and the premium and the attorney premium at any time during the proceeding and upon request from either party made within 14 days of the arbitrator's ruling on the merits.

(5) The right to attorneys' fees and expenses discussed in paragraph (4) supplements any right to at-

torneys' fees and expenses you may have under applicable law. Thus, if you would be entitled to a larger amount under the applicable law, this provision does not preclude the arbitrator from awarding you that amount. However, you may not recover duplicative awards of attorneys' fees or costs. Although under some laws AT&T may have a right to an award of attorneys' fees and expenses if it prevails in an arbitration, AT&T agrees that it will not seek such an award.

(6) The arbitrator may award injunctive relief only in favor of the individual party seeking relief and only to the extent necessary to provide relief warranted by that party's individual claim. **YOU AND AT&T AGREE THAT EACH MAY BRING CLAIMS AGAINST THE OTHER ONLY IN YOUR OR ITS INDIVIDUAL CAPACITY, AND NOT AS A PLAINTIFF OR CLASS MEMBER IN ANY PURPORTED CLASS OR REPRESENTATIVE PROCEEDING.** Further, unless both you and AT&T agree otherwise, the arbitrator may not consolidate more than one person's claims, and may not otherwise preside over any form of a representative or class proceeding. If this specific proviso is found to be unenforceable, then the entirety of this arbitration provision shall be null and void.

(7) Notwithstanding any provision in this Agreement to the contrary, we agree that if AT&T makes any change to this arbitration provision (other than a change to the Notice Address) during your Service Commitment, you may reject any such change and require AT&T to adhere to the language in this provision if a dispute between us arises.

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SUPREME COURT, U.S.

No. 07-976

IN THE
Supreme Court of the United States

T-MOBILE USA, INC., *ET AL.*,
Petitioners,

v.

JENNIFER L. LASTER, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR *AMICUS CURIAE* CTIA – THE WIRELESS ASSOCIATION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

CTIA – The Wireless Association ("CTIA") is the international organization of the wireless communications industry for wireless carriers and their suppliers. CTIA regularly advocates on behalf of its members in judicial, legislative, and regulatory matters.

Like petitioner T-Mobile USA, Inc. ("T-Mobile") — itself a CTIA member — CTIA members generally provide wireless communications services pursuant to uniform nationwide agreements. Those agreements regularly incorporate alternative dispute resolution provisions that rely on individual arbitration to resolve customer disputes, helping wireless carriers to continue to offer products and services at reduced rates and providing wireless consumers a quick and cost-effective method for resolving their disputes.

The decision of the Ninth Circuit in this case threatens to alter dramatically the way CTIA members conduct their business. By blessing the efforts of California and other States to advance anti-arbitration policies in contravention of federal law,

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[1] The parties have consented to the filing of this brief. Counsel for all parties have been given notice of the *amicus curiae*'s intention to file this brief as required by Supreme Court Rule 37.2(a). No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

the Ninth Circuit has undermined the utility of arbitration agreements and has cast uncertainty on the provisions contained in the contracts of hundreds of millions of wireless customers. The result will be higher costs and uncertainty for CTIA members and the threat of correspondingly higher rates for their customers. Accordingly, CTIA has a strong interest in making sure that this Court reviews, and ultimately reverses, the Ninth Circuit's decision here.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Ninth Circuit's decision undermines the Federal Arbitration Act ("FAA") and fosters a climate of hostility toward arbitration, imposing substantial and unnecessary costs on the hundreds of millions of customers that rely on wireless communications services. CTIA thus urges this Court to grant T-Mobile's petition.

I. The Ninth Circuit's decision is directly at odds with the FAA. As the Third Circuit correctly held in *Gay v. CreditInform*, 511 F.3d 369 (3d Cir. 2007), a categorical prohibition on individual arbitration provisions is inconsistent with the purposes of the FAA. Moreover, the text and history of the FAA make clear that Congress never intended for state policy judgments about what is substantively unfair to provide a ground for invalidating an otherwise proper arbitration clause. This case provides the Court with an opportunity not only to resolve the conflict between *Gay* and the decision below, but also

to clarify the limited role of state law in assessing the validity of arbitration clauses generally. If an arbitration clause is "valid" and "enforceable" once properly formed in a contract, then post-formation state law doctrines, such as substantive unconscionability, are expressly preempted by the FAA.

II. The Ninth Circuit's decision will have a sweeping impact on the wireless communications industry and on consumer businesses generally. First, virtually all members of the wireless industry — like those of many other industries — rely on alternative dispute resolution mechanisms to resolve disputes efficiently and to reduce costs for their customers. Individual arbitration clauses appear in hundreds of millions of subscriber contracts throughout the United States, and virtually all of those arbitration provisions are called into question if the Ninth Circuit's decision survives.

Second, the Ninth Circuit's decision will generate substantial and unnecessary litigation. The Ninth Circuit's decision directly conflicts with the Third Circuit's decision in *Gay*, and is sure to create widespread uncertainty and confusion. Wireless carriers will be forced to litigate Circuit by Circuit and State by State to determine when, under the FAA, state unconscionability law renders individual arbitration provisions unenforceable. Moreover, in those States in which individual arbitration clauses are foreclosed, class action litigation will multiply, and carriers will be forced to defend what are often

frivolous lawsuits that could be handled more efficiently and effectively through arbitration.

Third, the Ninth Circuit's decision unnecessarily ousts efficient market solutions. Wireless carriers operate in a highly competitive marketplace, resulting in better services at lower prices for consumers. In that market, there is a premium on maintaining customer loyalty — carriers have a substantial economic incentive to avoid losing customers. For that reason, most customer disputes are settled at the customer service level, and subscribers who take advantage of individual arbitration procedures are ordinarily satisfied with the outcome. Customers are happy, and the costs of dispute resolution are kept low. The Ninth Circuit's decision, however, forces carriers to abandon arbitration in favor of class action litigation. The result will be higher costs for carriers and customers alike, leaving the plaintiffs' bar as the only beneficiary.

Finally, the Ninth Circuit's intrusion is particularly inappropriate here, because wireless competition has generated arbitration clauses that provide substantial protections to customers. Wireless service contracts frequently contain arbitration cost-sharing mechanisms, permit consumers to elect to litigate in small claims court, and allow prevailing plaintiffs to pursue awards of attorneys' fees. Given these provisions, there is little likelihood that meritorious claims will be ignored or that wireless carriers will unjustifiably escape liability.

For all these reasons, review by this Court is urgently needed.

REASONS FOR GRANTING THE PETITION

I. The Court Should Grant Review to Clarify the Scope of Permissible State Court Interference with Arbitration Clauses.

This Court should grant review not only to resolve the direct conflict between the decision below and the Third Circuit's opinion in *Gay*, but also to clarify the limited scope of the FAA's savings clause — which the Ninth Circuit plainly misconstrued. As the Third Circuit correctly held in *Gay*, a categorical prohibition on individual arbitration provisions is inconsistent with the purposes of the FAA. Indeed, the text and history of the FAA make clear that Congress never intended for state policy judgments about what is substantively unfair to provide a ground for invalidating an otherwise proper arbitration clause. The Ninth Circuit's decision is wrong: state policy regarding the substantive unfairness of contracts that require resort to individual arbitration proceedings cannot trump federal policy embodied in the FAA.

The FAA provides that, as a matter of federal law, agreements to arbitrate are "valid, irrevocable, and enforceable . . . save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. As this Court has made abundantly clear, the "primary purpose" of the FAA is to "ensur[e] that private agreements to arbitrate are enforced according to their terms." *Volt Info.*

Sciences, Inc. v. Bd. of Trs., 489 U.S. 468, 479 (1989); *see also Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (noting that the FAA reflects "a liberal federal policy favoring arbitration agreements").

California's categorical prohibition on individual arbitration provisions cannot be reconciled with the FAA's text or policy. The Ninth Circuit concluded otherwise, suggesting that the California courts had invoked general principles of contract law in holding that the use of individual arbitration provisions was substantively unconscionable. But that is the very reasoning the Third Circuit rejected in *Gay*: although the state court cases "are written ostensibly to apply general principles of contract law, they hold that an agreement to arbitrate may be unconscionable simply because it is an agreement to arbitrate." *Gay*, 511 F.3d at 395; *see also id.* (noting that the state court decisions impermissibly "rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable" (citation and internal quotation marks omitted)). As the Third Circuit recognized, the hostility to arbitration that the Ninth Circuit condoned is exactly what Congress prohibited when it passed the FAA. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510-11 (1974); *see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626-627 (1985) ("[W]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of

arbitration as an alternative means of dispute resolution.").

The Ninth Circuit's approach is, moreover, particularly misguided because the FAA forecloses *all* reliance on substantive unconscionability as a basis for invalidating an arbitration provision. Section 2 of the FAA provides that arbitration agreements "shall be valid, irrevocable, and enforceable" as a matter of federal law unless state law provides grounds for "revocation." 9 U.S.C. § 2. Given Section 2's distinctive use of "revocation," on the one hand, and "valid[ity]" and "enforce[ment]" on the other, it must be assumed that the terms have different meanings. *See Conn. Dep't of Income Maint. v. Heckler*, 471 U.S. 524, 530 n.15 (1985) ("It is a familiar principle of statutory construction that courts should give effect, if possible, to every word that Congress has used in a statute.").

In this instance, the term "revocation" in the savings clause must be read to provide a defense to defects in contract formation, not a license for a State's unbridled consideration of substantive unfairness. Thus understood, the FAA sensibly incorporates the criticism of the common-law reluctance to enforce contractual provisions that "oust the courts of their jurisdiction." *See* Wesley A. Sturges, *A Treatise on Commercial Arbitrations and Awards* § 15, at 45 (1930) (noting the common law rule); *see also Gilmer*, 500 U.S. at 24 (explaining that the purpose of the FAA "was to reverse the longstanding judicial hostility to arbitration

agreements that had existed at English common law and had been adopted by American courts").

That is, although many courts prior to the FAA had refused to enforce arbitration provisions, other courts had held that contracts to arbitrate should be enforced absent evidence that the agreement was "induced by fraud, or overreaching, or entered into unadvisedly through ignorance, folly or undue pressure" — *i.e.*, agreements to arbitrate should be enforced absent *procedural* unconscionability that calls into question the validity of their formation. *See* Sturges, *supra*, § 15, at 47 (quoting *President of Delaware & Hudson Canal Co. v. Pennsylvania Coal Co.*, 50 N.Y. 250 (1872)). It was this approach to arbitration agreements that the FAA made binding federal law. *Cf. Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995) ("What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The [FAA] makes any such state policy unlawful . . . ."); *Nat'l R.R. Passenger Corp. v. Consol. Rail Corp.*, 892 F.2d 1066, 1070 (D.C. Cir. 1990) ("[T]he language of [Section] 2 . . . indicates that Congress created an exception to the general rule (that an arbitration clause will be enforced by its terms) only when there is a flaw in the formation of the agreement to arbitrate."); *Supak & Sons Mfg. Co. v. Pervel Indus., Inc.*, 593 F.2d 135, 137 (4th Cir. 1979) (explaining that Section 2 preempts any law of judicial or statutory origin that "restrict[s] the validity or enforceability of arbitration agreements," but "does

not displace state law on the general principles governing formation of the contract itself").[2]

That is the only sensible reading of the Act. It would make little sense for Congress to guarantee that arbitration agreements "shall be valid, irrevocable, and enforceable" as a matter of substantive federal law, yet simultaneously permit the survival of state judicial or statutory law that relies on a distrust of arbitration to eliminate all of the substantive benefits that arbitration provides. *See Zuni Publ. Sch. Dist. No. 89 v. Dep't of Educ.*, 127 S. Ct. 1534, 1545 (2007) (explaining that a statute should be construed in accordance with its "basic purpose and history"); *see also Preston v. Ferrer*, No. 06-1643, 2008 WL 440670, at *1 (U.S. Feb. 20, 2008) (reaffirming that the FAA "establishes a national policy favoring arbitration when the parties contract for that mode of dispute resolution" and "calls for the application . . . of federal substantive law regarding arbitration").

In sum, the FAA precludes reliance on California's law of substantive unconscionability to nullify T-Mobile's agreement to arbitrate, and the

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[2] Neither *Perry v. Thomas*, 482 U.S. 483 (1987), nor *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996), is to the contrary. The Court in *Perry* expressly declined to address the unconscionability arguments raised in that case, *see* 482 U.S. at 492 n.9, and the Court in *Doctor's Associates* had its focus trained on procedural concerns, not substantive fairness, 517 U.S. at 687 & n.3. Indeed, this Court has never since the passage of the FAA upheld the invalidation of a contractual arbitration provision on the basis of state substantive unconscionability law.

Ninth Circuit was wrong to conclude otherwise. If the Ninth Circuit's decision below remains the law, Section 2's robust pronouncements regarding the enforcement of arbitration clauses will be rendered meaningless in a large swath of the Country.

II. The Court Should Grant Review Because the Ninth Circuit's Decision Will Have a Sweeping Negative Impact on the Wireless Communications Industry and Its Customers.

1. Although the Ninth Circuit addressed only T-Mobile's customer service agreement, the reach of its opinion is far broader. Verizon Wireless, Sprint Nextel, and many other CTIA members employ individual arbitration clauses akin to the one at issue here. There are more than 240 million mobile telephone subscribers nationwide, and the vast majority have contracts that rely on individual arbitration proceedings to resolve most customer claims.[3]

The "Customer Agreement" used by Verizon Wireless, for example, contains a "Dispute Resolution and Mandatory Arbitration" section that provides as follows:

> EXCEPT FOR QUALIFYING SMALL CLAIMS COURT CASES, ANY CONTROVERSY OR CLAIM ARISING OUT

[3] Analogous provisions are common in other industries as well. *See, e.g.*, *Discover Bank v. Super. Ct.*, 113 P.3d 1100, 1103 (Cal. 2005) (examining individual arbitration clause in bank's cardholder agreement).

> OF OR RELATING TO THIS AGREEMENT, . . . OR ANY PRODUCT OR SERVICE PROVIDED UNDER OR IN CONNECTION WITH THIS AGREEMENT . . . , OR ANY ADVERTISING FOR SUCH PRODUCTS OR SERVICES, WILL BE SETTLED BY ONE OR MORE NEUTRAL ARBITRATORS BEFORE THE AMERICAN ARBITRATION ASSOCIATION ("AAA") OR BETTER BUSINESS BUREAU ("BBB").

Verizon Wireless, Customer Agreement, http://www.verizonwireless.com/b2c/index.html (follow "Customer Agreement" hyperlink) (last visited Feb. 22, 2008). In addition, it limits the availability of class relief, stating **"THIS AGREEMENT DOESN'T PERMIT CLASS ARBITRATIONS EVEN IF [ARBITRATION] PROCEDURES OR RULES WOULD. . . . IF FOR SOME REASON THE PROHIBITION ON CLASS ARBITRATIONS . . . IS DEEMED UNENFORCEABLE, THEN THE AGREEMENT TO ARBITRATE WILL NOT APPLY."** *Id.*

Likewise, the **"DISPUTE RESOLUTION"** section of the "Terms & Conditions" used by Sprint Nextel provides that: "We each agree to finally settle all disputes [except those brought in small claims court or before a government agency] only by arbitration." Sprint Nextel, Terms & Conditions, http://nextelonline.nextel.com/en/legal/legal_terms_privacy_popup.shtml (last visited Feb. 22, 2008). It goes on to limit class relief as follows:

> We each agree not to pursue arbitration on a classwide basis. We each agree that any arbitration will be solely between you and us (not brought on behalf of or together with another individual's claim). If for any reason any court or arbitrator holds that this restriction is unconscionable or unenforceable, then our agreement to arbitrate doesn't apply and the dispute must be brought in court. . . . TO THE EXTENT ALLOWED BY LAW, WE EACH WAIVE ANY RIGHT TO PURSUE DISPUTES ON A CLASSWIDE BASIS; THAT IS, TO EITHER JOIN A CLAIM WITH THE CLAIM OF ANY OTHER PERSON OR ENTITY, OR ASSERT A CLAIM IN A REPRESENTATIVE CAPACITY ON BEHALF OF ANYONE ELSE IN ANY LAWSUIT, ARBITRATION OR OTHER PROCEEDING.

Id.

The harm caused by the Ninth Circuit's decision is thus truly industry-wide and nation-wide, as carriers across the country face substantial uncertainty as to the enforceability of critical provisions of hundreds of millions of customer contracts. The very breadth of the Ninth Circuit's ruling is a powerful reason for this Court's review.

2. The Ninth Circuit's sweeping decision also merits review because it is certain to generate substantial volumes of costly and entirely unnecessary litigation. First, wireless carriers no longer know the preemptive scope of the FAA. It is

bad enough that carriers are now subject to unconscionability analysis that varies from State to State within the Ninth Circuit. *See, e.g.*, *Lowden v. T-Mobile USA, Inc.*, 512 F.3d 1213, 1221 (9th Cir. 2008) (holding that the FAA does not preempt Washington's law of unconscionability). But carriers now face additional uncertainty: outside the Ninth and Third Circuits, they do not even know whether federal law or state law will govern the validity of their individual arbitration clauses, much less how individual States will resolve challenges to those provisions on the merits. Without this Court's intervention, carriers will have to litigate — Circuit by Circuit and State by State — simply to determine applicable law.

Second, in jurisdictions (such as California and Washington) in which state law governs and forbids resort to individual arbitration proceedings under the FAA, CTIA members will be forced into lengthy and costly class action litigation, thus losing the well-recognized benefits of arbitration. *See, e.g.*, H.R. Rep. No. 97-542, at 13 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 765, 777 ("The advantages of arbitration are many: it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; it is often more flexible in regard to scheduling of times and places of hearings and discovery devices . . . .").

Worse, many of the class claims are baseless, making the costs of forced class litigation a

particularly bitter pill to swallow. The instant litigation makes that all too clear. Respondents contend that T-Mobile's advertising was misleading because it advertised cell phones as free or heavily discounted, but did not disclose that sales tax would be calculated on the full retail price. Yet, it was California law that required sales tax to be calculated on the unbundled price of the phone, *see* Cal. Code Regs. tit. 18, § 1585(b)(3), and plaintiff Laster does not contest that her receipt set forth the $28.22 sales tax accurately and even indicated that "[b]y law, some states impose a tax based on the retail price or cost of our product instead of the discounted price." First. Am. Compl., *Laster v. T-Mobile USA, Inc.*, No. 05-1167 ¶ 23 (S.D. Cal. filed Aug. 12, 2005); Pet. App. 9a. Over two and a half years later, this meritless litigation continues.

Unfortunately, T-Mobile's experience is by no means unique. Verizon Wireless, for example, currently faces claims challenging the imposition of a small administrative charge that was authorized under plaintiffs' contracts with Verizon, and for which plaintiffs received advance notification. *See generally Litman v. Cellco Partnership*, No. 07-4886 (D.N.J.). That case, which was commenced prior to the Third Circuit's decision in *Gay*, has subjected Verizon Wireless to months of litigation in federal court that its individual arbitration provision was designed to avoid. *See Preston*, 2008 WL 440670, at *2 (recognizing that arbitration "long delayed [is] in contravention of Congress' intent").

Similarly, in *Meinhold v. Sprint Spectrum, L.P.*, No. 07-0456, 2007 WL 2904003 (E.D. Cal. Oct. 2, 2007), plaintiff brought a class action claiming that she had relied on certain representations by Sprint, even though (as soon became clear) she had never seen, much less relied upon, the alleged misrepresentations before changing her position. *Id.* at *4-*5. The district court ultimately dismissed her class action allegations and remanded her individual claims to state court, but not before Sprint was forced to endure months of litigation. *Id.* at *5; *see also Meinhold v. Sprint Spectrum L.P.*, No. 07-0456, 2007 WL 1456141, at *6 (E.D. Cal. May 16, 2007) (granting motion to dismiss with leave to amend).

In the wake of the Ninth Circuit's decision, such costly and meritless litigation is certain to multiply.

3. That increase in litigation, unwelcome generally, is particularly so here, given the competitive conditions in which wireless carriers operate. As the Federal Communications Commission recently confirmed, "competition in mobile telecommunications markets is flourishing," to the benefit of the industry's more than 240 million subscribers. *In re Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, FCC 08-28, WT Docket No. 07-71 ¶¶ 290-291 (Feb. 4, 2008). As their use of mobile phones continues to grow in response to "[r]elatively low prices," wireless communications customers benefit from improved call quality and experience better customer care performance. *See id.* ¶¶ 225, 290.

In such a competitive industry, "churn" — "the percentage of current customers an operator loses over a given period of time" — is a major concern. *Id.* ¶¶ 186-187. By increasing customer loyalty (that is, reducing churn), wireless carriers increase their profits, as well as the rate at which their revenues accrue. *Id.* ¶ 187. Wireless carriers therefore have every incentive to keep their customers happy.

Service quality and price are vital to attracting and retaining customers. *Id.* ¶ 188. Resolving customer disputes via individual arbitration proceedings is the mechanism the market has adopted to maintain customer satisfaction while keeping costs low. Most small claims are resolved at the customer service level, *cf. Ting v. AT&T*, 182 F. Supp. 2d 902, 917 (N.D. Cal. 2002) (finding it "unlikely that the typical customer dispute about service or under $1000 will be resolved through arbitration; it most likely will be resolved by [defendant]'s customer care representatives or their supervisors"), *aff'd in part & rev'd in part*, 319 F.3d 1126 (9th Cir. 2003), and, when claims do result in individual arbitration, most customers are satisfied with the process, *see, e.g.*, Kirk D. Jensen, *Can Financial Institutions Be Required to Arbitrate on a Class-Wide Basis Notwithstanding Provisions That Prohibit Class Arbitration?*, 122 Banking L.J. 328, 336 (2005) ("[S]tudies have shown that individuals believe they are treated fairly in arbitration."); Harris Interactive, *Arbitration: Simpler Cheaper, and Faster Than Litigation* 5 (Apr. 2005) (conducted for U.S. Chamber Institute for Legal Reform, Apr. 2005), available at

http://www.instituteforlegalreform.com/issues/docload.cfm?docId=489 ("Most participants are very satisfied with the arbitrators' performance, the confidentiality of the process and its length."); *see also Allied-Bruce*, 513 U.S. at 280 ("[A]rbitration's advantages often would seem helpful to individuals . . . complaining about a product, who need a less expensive alternative to litigation."); Fed. Trade Comm'n, *Resolving Consumer Disputes: Mediation and Arbitration* (Aug. 1998), http://www.ftc.gov/bcp/edu/pubs/consumer/general/gen05.shtm (informing consumers that arbitration "can be quicker, cheaper, and less stressful than going to court").

The Ninth Circuit's decision displaces the efficient market solution reached by the carriers and their customers, replacing it with a far more costly method for resolving complaints. And given the competitive conditions that drive the wireless industry to provide better service at lower prices, the beneficiaries of the Ninth Circuit's largesse are certainly not consumers, who have indicated no desire to pay higher fees for the ability to air minor complaints through class actions. Instead, the principal beneficiaries are the legions of plaintiffs' lawyers eager for class action fees.

4. The Ninth Circuit's intervention is particularly unfortunate because robust competition in the wireless industry has resulted in arbitration clauses that are fully protective of consumers. CTIA members' arbitration clauses, for example, allow customers to pursue claims in small claims court,

provide for arbitration fee sharing, and permit a prevailing plaintiff to recover attorneys' fees.

Such arbitration clauses provide ample avenues for customers to seek relief, particularly because, as elsewhere, lawyers will likely remain willing to pursue claims where "[a]ttorneys' fees are recoverable." *Johnson v. W. Suburban Bank*, 225 F.3d 366, 374 (3d Cir. 2000); *see Snowden v. CheckPoint Check Cashing*, 290 F.3d 631, 638 (4th Cir. 2002) (rejecting argument that individual arbitration provision was unconscionable where prevailing plaintiff could recover attorneys' fees); *see also Gilmer*, 500 U.S. at 32 (noting adequacy of individual arbitration where alternate enforcement mechanisms were available); Jensen, *supra*, at 337 ("[E]mpirical evidence indicates that individual arbitration provides manifold benefits to consumers.").

Arbitration clauses such as those used by CTIA members thus do not threaten to "insulate a party from liability that otherwise would be imposed." *Discover Bank v. Super. Ct.*, 113 P.3d 1100, 1109 (Cal. 2005). To the contrary, they provide cost-effective, easy-to-navigate dispute resolution mechanisms that help customers and carriers alike. *See id.* at 1121 (Baxter, J., concurring and dissenting) (observing that "the majority exaggerates the difficulty of pursuing modest claims where class treatment is unavailable and overlooks the many other means by which [the defendant] could be called to account for [its alleged conduct]"). The Ninth Circuit's decision to permit California to categorically

foreclose such mechanisms merits this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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